132-152

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~221~~. 67

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS J. SUMNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED SEPTEMBER 4, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 331.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 13, 1888.

1 UNITED STATES OF AMERICA,
Western District of North Carolina:

Circuit Court, Fourth Circuit, Charlotte, N. C.

Be it remembered that on the 16th day of November, A. D. 1883, John Glenn, trustee of the National Express and Transportation Company, sued out of our said court a summons in the words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA,
Western District of North Carolina:

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
against
THOMAS J. SUMNER, Defendant.

The President of the United States of America to the marshall of the western district of North Carolina, Greeting:

You are hereby commanded to summon Thomas J. Sumner, a citizen and resident of the western district of North Carolina, to appear
2 before the judges of the circuit court of the United States at the next term of said court to be held for the district aforesaid, at Charlotte, on the second Monday in December next, then & there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, the plaintiff herein, citizen and resident of Maryland, which complaint will be filed in said court within the first three days of said term; and let the said defendant take notice that if he fail to answer the said complaint within the time limited by law the plaintiff will take judgment againt him for the relief demanded in the complaint according to the regular course of the court. Herein fail not and have then & there this summons.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Charlotte, in said district, the 16th day of November, 1883, and in the 108th year of the Independence of the United States.

[SEAL.] H. O. COWLES, *Clerk.*

3 And afterwards, on December the first, 1883, the said writ is returned into our said court with an endorsement thereon in the words and figures as follows, to wit:

Endorsement.

Executed November 28th, 1883, by personally summoning the defendant to appear as within directed.

THOMAS B. KEOGH,
U. S. Marshall,
By M. K. CALLAM, *D. M.*

And on December the 7th, 1883, the plaintiff aforesaid filed in our said court his complaint; which said complaint being lost or mislaid, on December the 18th, 1885, by consent and by order of the court, a complaint is filed as substitute for former one so lost or mislaid; which said complaint is in the words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the Western District of North Carolina.

JOHN GLENN, Trustee of the National Express & Transportation Company,

vs.

T. J. SUMNER.

Plaintiff, complaining of defendant, alleges—

4 First. That plaintiff is and was at the time of issuing the summons in this case a citizen of Maryland and the defendant a citizen of the western district of the State of North Carolina.

2nd. That the defendant is indebted to the plaintiff in the sum of seven thousand five hundred dollars, for that the defendant, on or about the first day of November, 1865, subscribed for two hundred and fifty shares of the capital stock of the National Express and Transportation Company, a body corporate of the State of Virginia duly incorporated under the laws thereof, and thereby undertook and promised to pay to said company for each and every share so subscribed for by said defendant the sum of one hundred dollars in such installments and at such times as said defendant might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the law under which said company was incorporated, whereby and by force of said subscription said defendant became and was received and admitted as stockholder in said company.

3rd. That on the 20th day of September, 1866, the said National Express and Transportation Company, by its deed of that
5 date, duly executed, acknowledged, and recorded, assigned and transferred to John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, in trust for the benefit of the creditors of said company, all its property, rights, credits, and effects of every kind in trust, to reduce the same to money, and to apply the proceeds thereof to the trust declared by said deed, including the trust therein declared for the payment of the debts of the said company.

4th. That afterwards in a certain cause instituted and depending in the chancery court of the city of Richmond, in the State of Virginia, in which John W. Wright, sheriff of the city of Richmond, and as such official administrator of W. W. Glenn, deceased, and other persons, claiming to be creditors of said company, were complainants, and the said The National Express and Transportation Company, the said John J. Kelly, John Blair Hoge, and certain other persons, officers of said company, were defendants, it was on

the 14th day of December, 1880, adjudged, ordered, and decreed by the said chancery court, the same being a court of competent jurisdiction, that said plaintiff should be and he was by said de-
6 cree appointed and constituted trustee to execute the trusts of said deed of trust in the room and stead of the trustees originally created by said deed of trust and to whom said deed was executed as aforesaid; and it was in said cause and by said court further adjudged, ordered, and decreed that a large amount of debts secured by said deed of trust of said National Express and Transportation Company remained unpaid and entitled to be paid out of the property conveyed by said deed, and that of the sum of one hundred dollars for each and every share of the stock of said company undertaken and promised to be paid for by the subscribers of said stock and their assigns, stockholders of said company, in such installments and at such times as said subscribers and their assigns might be lawfully required to pay the same according to the legal tenor and effect of the law under which said company was incorporated and said stock subscribed for the sum of eighty dollars per share had never heretofore been called for or required to be paid by the president and directors of said company, and that said sum of eighty dollars per share for each and every share of said stock subscribed for yet remained liable to be called for and required to be paid by
7 the subscribers for said stocks and their assigns, stockholders of said company, according to the legal tenor and effect of their subscriptions for the same, as hereinbefore set forth; that it was further adjudged, ordered, and decreed that it was necessary and proper that thirty per cent. of the par value of each share of said stock should be called for and required to be paid by the subscribers therefor and their assigns for the purpose of paying the debts of said company under the provisions of the said deed of trust, and it was accordingly adjudged, ordered, and decreed by said court in said cause that a call and assessment be, and the same was thereby, made upon the stock and stockholders of said company and their assigns of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, the same when paid to be paid and received by the said plaintiff as trustee under said deed in the room and stead of the original trustees therein named.

5th. That the plaintiff accepted the appointment so made by said decree and complied with the terms and conditions thereof, and was and is duly qualified to act as said substituted trustee and to
8 have the rights and perform the duties conferred upon and required of him by the said decree.

6th. That by force of said decree and of the statutes of the State of Virginia in such case made and provided, before accepting such appointment as trustee and qualifying as such as required by said decree, he, the said plaintiff, then and there became and was and still is substituted to all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust, and became and was and still is lawfully entitled to receive and collect the said assessment or call of thirty dollars per share on each & every share of stock of said company from the persons liable to pay the same; and

it was further adjudged, ordered, and decreed that he as substituted trustee be and he was by the said decree authorized and directed to collect and receive the said call and assessment and to take such steps to that end as he should be advised.

7th. That by force of said contract of subscription to the stock of said company and of said call and assessment so made by said decree the said defendant became and is indebted and liable to
9 pay to the plaintiff the sum of seven thousand five hundred dollars, being the amount of thirty dollars on each of said shares of the stock of said company so as aforesaid subscribed for by said defendant; and, being so liable to pay, the said defendant, in consideration thereof, promised to pay said sum to the plaintiff when thereto requested; and the defendant, although requested by the plaintiff, failed and refused to pay the same to the plaintiff and still refuses so to do.

Wherefore the plaintiff prays judgment against the defendant for the sum of seven thousand five hundred dollars and interest until paid, together with costs and disbursements.

D. G. FOWLE,
Attorney for Plaintiff.

John Glenn, plaintiff in the above-entitled action, maketh oath that the facts set forth in the above complaint as of his own knowledge are true and those stated upon information and belief he believes to be true.

JOHN GLENN.

Sworn and subscribed before me this 18th day of December, 1885.
H. C. COWLES, *Clerk.*

10 And at a regular term of our said court, held in Charlotte, on the 2d Monday in December, 1883, in and for said district, proceedings are had in said cause in the words and figures as follows, to wit:

Defendant allowed 90 days to file his answer and the said cause continued, and said plaintiff file- his bond for costs in the words and figures as follows, to wit:

Bond.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court, Fourth Circuit.

JOHN GLENN, Trustee of the National Express and Transportation Company,
against
THOMAS J. SUMNER.

Know all men by these presents that we, John Glenn, trustee, as principal, and D. G. Fowle and Armistead Jones, as surety, are held

and firmly bound unto the defendant in the above-entitled action in the sum of three hundred dollars; to the payment of which we bind ourselves firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1883.

The condition of the above obligation is such that whereas the plaintiff in the above-named cause has brought an action
11 against the said defendant therein, now if the said plaintiff shall prosecute the said action with effect, or, in case he fail therein, shall well and truly pay all such costs and damages as shall be awarded and recovered against the said plaintiff in said action, then the above obligation is to be void; otherwise it is to remain in full force and effect.

JOHN GLENN, *Trustee*,
By A. JONES. [SEAL.]
DANIEL FOWLE,
By A. JONES. [SEAL.]
ARMISTEAD JONES. [SEAL.]

And afterwards, to wit, on March 15, 1884, the defendant files his answer in the words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States for the Western District of North Carolina.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
against
THOMAS J. SUMNER, Defendant.

The defendant, Thomas J. Sumner, answering the complaint of the plaintiff, says, for a first defense thereto—

I. Paragraph one of the complaint is admitted.

II. Paragraph two of the complaint is not true, as the defendant is informed, advised, and believes.

III. The defendant has no knowledge or information suffi-
12 cient to form a belief as to the truth of the allegations contained in the third, fourth, fifth, and sixth paragraphs of the complaint.

IV. Paragraph seven of the complaint is not true, as defendant is informed, advised, and believes.

For a second defense the defendant says—

I. That the cause of the action alleged in the complaint did not accrue within three years next before the commencement of this action, and the defendant pleads the statute of limitations in such case made and provided in bar of the same.

II. That the cause of action alleged in the complaint did not accrue within ten years next before the commencement of this action, and the defendant pleads the statute of limitations in such case made and provided in bar of the same.

For a third defense the defendant says—

I. That on or about the first day of November, 1865, in the city of Charlotte, within the district and State aforesaid, the defendant did subscribe for a number of shares of stock in an express company then being formed. The number of shares which the defendant subscribed for was fifty, according to defendant's best recollection
13 and belief; and defendant is informed and believes that the said express company was some time afterwards organized as the National Express and Transportation Company; that defendant never received a certificate of stock or other evidence of said subscription, nor did he ever pay therefor nor make at any time any payment or pay any assessment thereon, nor was he notified or called upon to do so; that within a short period after making his said subscription the defendant transferred all his right and interest in his said subscription to Benjamin Hart, a citizen of the State of New York and a man who was perfectly solvent. The transfer to said Hart was made at the solicitation of the latter, as a matter of accommodation to him, and was *bona fide*, the said Hart being at the time a director in said company and the said company being free from debt and not involved in any way; that said Hart assumed all the obligations and liabilities which devolved upon defendant by virtue of said subscription, and, as defendant is informed and believes, immediately after said assignment or transfer the said Hart, or some solvent assignee of the said Hart, was accepted by said com-
14 pany as a stockholder in the place and stead of the defendant.

II. That more than ten years had elapsed since the transfer of defendant's subscription as aforesaid to the said Hart next before the commencement of this action, and defendant pleads the statute of limitations to such case in bar of the same. For a fourth defense the defendant says that on the 25th day of August, 1875, the defendant was duly adjudicated a bankrupt on his own petition by the district court of the United States for the western district of North Carolina, and that thereafter, on the 31st day of May, 1879, at Statesville, in said district, he was duly granted a discharge in bankruptcy, whereby, pursuant to the act *of* establishing a uniform system of bankruptcy, ratified March 2, 1867, the defendant was forever released from all debts, claims, liabilities, and demands which might have been proved against his estate in bankruptcy; that the liability alleged in the complaint, if any such did ever accrue, might have been so proved, and defendant pleads his said discharge as a complete bar to this action. A full copy of said discharge is hereto annexed, marked Exhibit (A), and is made a part of this answer.

15 JONES & JOHNSTON &
BLACKMER & HENDERSON,
Attorneys for the Defendant.

Thomas J. Sumner, defendant above named, being duly sworn, says the foregoing answer is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

THOS. J. SUMNER.

Sworn & subscribed before me this 15th day of March, A. D. 1884.

THOS. M. PITTMAN,
U. S. Commissioner for W. D. of N. C.

EXHIBIT (A).

District Court of the United States, Western District of North Carolina.

Whereas Thomas J. Sumner, of Salisbury, in the county of Rowan and State of North Carolina, has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that the said Thomas J. Sumner be for-
16 ever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 25th day of August, 1875, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of the court at Statesville, in said district, this 27th day of May, A. D. 1879.

[SEAL.] ROBERT P. DICK,
District Judge.

Filed this 31st day of May, 1879, at 12 o'clock m.

I, H. C. Cowles, clerk of the district court of the United States for the western district of North Carolina, at Statesville, do hereby certify that the above is a true copy of the original certificate of discharge of record on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Statesville, in the western district of North Carolina, this the 31 day of May, in the year of our Lord one thousand eight hundred and seventy-nine, and of the
17 Independence of the United States of America the 103d.

[SEAL.] H. C. COWLES, *Clerk.*

And at another regular term of our said court held in the city of Charlotte, in and for said district, on the 2d Monday in December, 1885, said cause being reached and coming on to be heard on December 18th, 1885, further proceedings are had therein in the words and figures as follows, to wit:

Let a jury come to try the issues joined between the parties.

Thereupon the following jurors, to wit, C. W. McCay, M. S. Merrill, George M. Armstrong, R. R. Ray, J. E. Rhyne, E. L. Pegram, W. H. Hawser, S. W. Davis, G. W. Bear, Cephas Straupe, S. H. Marks, and E. D. McGinnis, being chosen, tried, & sworn to speak the truth of and concerning the issues submitted & joined between the parties in this action, for their verdict say that they find all issues in favor of defendant. Thereupon a judgment is rendered by the
18 court and ordered to be entered of record, which said judgment is in the words and figures as follows, to wit:

Judgment.

Circuit Court of United States, Western District of North Carolina, at Charlotte. Dec'r Term, 1885.

JOHN GLENN, Trustee of National Express & Transportation Co., Plaintiff,
against
THOS. J. SUMNER, Defendant.

This case coming on to be tried at said term of the circuit court aforesaid by a jury, and a verdict having been rendered finding all the issues raised by pleadings in favor of the defendant, it is now, on motion of Jones & Johnston, attorneys for defendant, considered and adjudged by the court that the plaintiff take nothing by his said writ, and that the defendant do recover against the plaintiff and the surety on his prosecution bond his costs of action, to be taxed by the clerk of this court.

HUGH L. BOND,
C't Judge.

19 And the plaintiff files his exceptions thereto in the words and figures as follows, to wit:

Exceptions.

Circuit Court of United States, Western District of North Carolina, at Charlotte. December Term, 1885.

JOHN GLENN, Trustee of National Express & Transportation Co., Plaintiff,
against
THOS. SUMNER, Defendant.

The plaintiff excepts to the ruling of the court in above-entitled case, and for cause of exception shows that upon the trial in said case at term aforesaid it was proved that the defendant, Thos. J. Sumner, was a stockholder in the National Express & Transportation Company, a corporation duly organized under the act of the Legislature of Virginia, ratified 12 December, 1865; that at time of organization of said corporation he paid — per cent. on his said stock and residue was unpaid; that the said corporation suspended business because insolvent, and made a deed of trust to trustees to secure its creditors in the year 1866; that in the year 1875 the defendant filed his voluntary petition in bankruptcy in said dis-
20 trict and was thereafter adjudged a bankrupt and discharged from all his debts and liabilities in the year 1879.

It was further proved that a decree was rendered on 14 Dec'r, 1880, in a suit in chancery court of the city of Richmond, a court of com-

petent jurisdiction over said corporation, wherein Glenn, administrator, was plaintiff and the said National Express & Transportation Company was defendant and certain trustees under a deed of assignment executed by the said company conveying all its property, choses in action, as well as unpaid capital stock of said defendant. and from said decree it appeared that a call of only 20 per cent. of the capital stock had been made, and that there remained eighty dollars per share which had not been called for or paid, and in order to pay debts of said company provided for in said assessment a call of thirty per centum upon the capital stock of said company was made by said court. A copy of record of said chancery court of Richmond is hereto appended as a part hereof, marked A. The original bill therein was filed in 1871. Suit was brought on 16th
November, 1883, to recover of defendant 30 per cent. of the
21 par value of the 250 shares stock held by him. The answer shows the defences set up, which include the plea of his discharge in bankruptcy, in bar of recovery.

The plaintiff contended that it was not a provable debt at the time of filing of petition in bankruptcy. The court held that it was a provable debt & that discharge barred it, and so instructed the jury. Verdict for defendant.

HUGH L. BOND,
C't Judge.

And on the 16th day of January, 1886, a writ of error is sued out of our said court by the said plaintiff in the words and figures as follows, to wit:

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of North Carolina, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before
22 you, between John Glenn, trustee of the National Express and Transportation Company, and Thomas J. Sumner, a manifest error hath happened, to the great damage of the said John Glenn, trustee as aforesaid, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of January, in the year of our Lord one thousand eight hundred and eighty-six.

23 [SEAL.] H. C. COWLES,
Clerk of the Circuit Court for the Western District of North Carolina.

And on the 20th day of January, 1886, the said plaintiff files his appeal bond in the words and figures as follows, to wit:

Appeal Bond.

24 Supreme Court of the United States.

JOHN GLENN, Trustee of the National Express and Transportation Company,
against
THOMAS J. SUMNER.

Know aall men by these presents that we, John Glenn, trustee, of the city of Baltimore and State of Maryland, and J. P. Haywood and O. H. Foster, of Raleigh, State of North Carolina, are held and firmly bound unto Thomas J. Sumner, of the county of Rowan and State of North Carolina, in the sum of five hundred dollars, to be paid to the said Thomas J. Sumner, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

25 Sealed with our seals. Dated this the 14th day of January, 1886.

Whereas the above-named John Glenn, trustee, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States held for the western district of North Carolina at Charlotte, North Carolina:

Now, therefore, the condition of the above obligation is such that if the above-named John Glenn, trustee, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN GLENN, *Trustee.* [SEAL.]
J. P. HAYWOOD. [SEAL.]
O. H. FOSTER. [SEAL.]

Test: GEORGE HEINRITZ.

O. H. Foster, being sworn, says that he is worth the sum of five hundred dollars over and above his liabilities and proper exemptions by law from execution.

O. H. FOSTER.

Sworn and subscribed before me January 14, 1886.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

W. J. RIDDICK,
Clerk U. S. Circuit Court, E. D. N. C.

26 J. P. Haywood, being sworn, says he is worth the sum of five hundred dollars over and above his liabilities and proper exemptions allowed by law.

J. P. HAYWOOD.

Sworn to before me this the 15th day of January, 1886.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

W. J. RIDDICK,
Clerk U. S. Circuit Court, E. D. N. C.

Approved:
ROB'T P. DICK,
U. S. Dist. Judge.

Jan'y 20th, 1886.

27 On the said 20th day of January, 1886, a citation is issued out of our said court in the words and figures as follows, to wit:

Citation.

United States of America to Thomas J. Sumner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of North Carolina, wherein John Glenn, trustee of the National Express and Transportation Company, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 20th day of January, in the year of our Lord one thousand eight hundred
28 and eighty-six.

ROB'T P. DICK,
U. S. Dist. Judge.

And is returned with an endorsement thereon in the words and figures as follows, to wit:

Endorsement.

Personal service of the copy of the within citation is hereby admitted January 20th, 1886, not waiving anything.

JONES & JOHNSTON,
Counsell for T. J. Sumner, Def't.

29 UNITED STATES OF AMERICA,
Western District of North Carolina:

Circuit Court, Fourth Circuit, Charlotte, N. C.

I, H. C. Cowles, clerk of the circuit court of the United States for the western district of North Carolina, at Charlotte, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify the foregoing writing to be a full, true, and perfect transcript and exemplification of the records and proceedings in the case of John Glenn, trustee of the National Express and Transportation Company, plaintiff in error, against Thomas J. Sumner, defendant in error, as fully as the same remain on file and of record in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of Charlotte, in said district, this the 6th day of August, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal United States Circuit Court, Western Dist. of N. C.]

H. C. COWLES,
Clerk of said Court.

Endorsed on cover: W. North Carolina C. C. U. S. No. 331. John Glenn, trustee of the National Express and Transportation Company, plaintiff in error, *vs.* Thomas J. Sumner. Filed September 4, 1886.

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 67.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS J. SUMNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED SEPTEMBER 20, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

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vs.

THOMAS J. SUMNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

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1 In the Supreme Court of the United States, October 7th, 1889.

JOHN GLENN, Trustee of National Express and Transportation Co., Plaintiff in Error,
against
THOMAS J. SUMNER, Defendant in Error. } No. 67.

In error to the circuit court of the United States for the western district of North Carolina.

Agreement of Counsel.

It is agreed that the clerk of the Supreme Court of the United States, instead of printing as part of the Supreme Court record in this case the copy of the record of the chancery court of the city of Richmond, referred to in bill of exceptions as being marked "A," and filed in the case under agreement of counsel, shall print as part of the Supreme Court record in this case the agreed record as taken from the said record of the chancery court of the city of Richmond as follows, to wit:

One hundred and thirty-eight pages of said record hereto attached, and that the same shall constitute the record in this case, with leave to either party to refer in the Supreme Court to any part of the original record marked "A" not included in said agreed record.

2 This agreement to be filed this the eighteenth day of September, 1889.

S. F. PHILLIPS,
For Sumner.
W. W. FLEMMING,
For Pl't'f in Error.
C. MARSHALL,
For Pl'ff in Error.

3 In the Chancery Court of the City of Richmond.

W. W. GLENN'S ADMINISTRATOR, &c.,
v.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

VIRGINIA:

Pleas Before the Judge of the Chancery Court of the City of Richmond.

Be it remembered that heretofore, to wit, on the 28th day of November, 1871, came the plaintiff, W. W. Glenn, suing on his own behalf and of such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof, by counsel, and sued out of the clerk's office of the chancery court of the city of Richmond subpœnas in chancery against the defendants, William H. Perot, presi-

dent of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, directed to the sheriffs of the city of Richmond and town of Staunton, and returnable to 1st December rules, 1871; which subpœnas in chancery and returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, Wm. H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for
4 the said court on the first Monday in December, 1871, to answer a bill in chancery exhibited against them in our said court by W. W. Glenn, suing on his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become parties to this suit and contribute to the expenses thereof; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed on Joseph R. Anderson, November 25th, 1871, by delivering him a true copy of the within spa. in chan. The others not found.

BENJ. T. AUGUST, *D. S.*,
For JOHN W. WRIGHT, *S. C. R.*

Executed in the city of Richmond, said Anderson being a resident of said city.

The Commonwealth of Virginia to the sheriff of the town of Staunton, Greeting:

We command you that you summon W. G. Harman to appear at the clerk's office of the court of chancery of the city of Richmond at the rules to be held for the said court on the first Monday in December, 1871, to answer a bill in chancery exhibited against him and others in our said court by W. W. Glenn, suing in his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become parties to this suit and contribute to the expenses thereof; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the court-house, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed December 4th, 1871, as to M. G. Harman by leaving at his residence, in the city of Staunton, with a white member of his family over sixteen years of age a copy of this "ch'y spa.," explained its purport, and requested that the same be handed to said M. G. Harman on his return, he being from home at the time.

W. L. MAURY, *S. A. Co.*

And at another day, to wit, at rules held in the clerk's office of the chancery court of the city of Richmond, on the first Monday, being the 4th day, of December, 1871, came the plaintiff and filed his bill; which bill and exhibits therewith are in the words and figures following, to wit:

Bill.

W. W. GLENN
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

To the Honorable Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

Humbly complaining, showeth unto your honor, your orator, William W. Glenn, of Baltimore city, who files this bill on behalf of himself and such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof, that your orator is a creditor of the National Express and Transportation Company to the amount of $42,501.31, with interest thereon from the 24th day of June, 1870, for which sum your orator recovered a judgment against said company, in the superior court of Baltimore city, on the 24th day of June, 1870, as will appear by a short copy of said judgment, herewith filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 1, and full transcript of which judgment your orator will produce when thereto required.

And your orator charges that said National Express and Transportation Company was duly incorporated by the Legislature of the State of Virginia on the — day ——, 1865, as will appear from the act of incorporation found among the printed laws of said State, to which reference is hereby made and a copy whereof will be produced when required.

And your orator further charges that said company accepted said act of incorporation and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company, having become much embarrassed in its affairs, and owing

large debts to various persons, executed a deed of trust for the benefit of its creditors to the defendants, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, dated the 20th day of September, 1866, which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere, and a copy of which is herein-
6 with filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 2.

And your orator further charges that the assets of said company, to which its creditors have to look mainly for the payment of their debts, consist of the amounts contracted to be paid by the subscribers to its capital stock.

And your orator charges that the total number of shares of the stock of said company which had been subscribed for at the date of said assignment was 40,044, each share being of the par value of $100, and said subscriptions representing the large aggregate of 4,004,400, and that on the 29th day of October, 1866, the condition of said company, with reference to its stock and debts, was reported at a meeting of stockholders as follows:

There had then been subscribed for of the stock of said company—

557	shares	on	which	nothing	had	been paid.
1,154	"	"	1	per cent.	had	been paid, but no certificates issued.
2,169	shares	on	which	5	per cent.	had been paid.
20	"	"	7½	"	"	"
8,087	"	"	10	"	"	"
25	"	"	11	"	"	"
20	"	"	12½	"	"	"
250	"	"	13	"	"	"
12,554	"	"	15	"	"	"
20	"	"	15½	"	"	"
15,188	"	"	20	"	"	"
40,044	shares.					

And your orator charges that the subscribers to the capital stock of said company resided and now reside in many States and not within the jurisdiction of any one court.

And your orator further charges that by the terms of the subscription the subscribers were bound to pay the amount of said subscriptions as and when the same should be called for by said company.

And your orator further charges that the total amount of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of the subscriptions, and that the amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth above.

And he is informed and believes and, believing, charges that a very small part, if any, of the said assessments to the amount of twenty per cent. which remained unpaid at the date of said report has been since paid or collected from the delinquent stockholders.

7 And your orator further charges that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remains uncalled for and unpaid.

And your orator charges that said trustees were not requested to take possession of said trust estate under said deed until on or about the 3rd day of November, 1866, and that in the meantime nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors, and that the amount of the same was wholly insufficient to pay the debts of said company.

And he further charges that said company had hypothecated or otherwise used and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and he charges that the actual amount of money realized and received by said trustees under said assignment was not sufficient to pay the debts due the preferred creditors of the first class, mentioned in said deed of trust.

And your orator further charges that of the amount of the said assessments upon the subscribers of twenty per cent. a large part cannot be collected at all by reason of the insolvency of the subscribers, and your orator is informed and believes and, believing, charges that a large part of said assessments has been lost by the lapse of time and cannot now be collected.

And your orator further charges that as to the debts due upon said unpaid assessments said trustees allege that they have been hindered and delayed in the collection of the same by adverse litigation in the State of Maryland and in the State of New York and in other States, and he charges that it is represented by said trustees that their right to collect the debts due the company by subscribers on said assessments has been called in question in some of the suits and the validity of said deed of trust has been disputed.

And your orator further charges that in some of said suits said trustees have been enjoined from proceeding to collect the debts due said company, and said trustees have thus far been able, as they represent, to collect very little, if any, of said debts by reason of the difficulties interposed by said litigation.

And so your orator charges that the debts due said company and which ought to be applied to the payment of its creditors are either now lost in a great part or are in danger of being lost, and are not now available for the payment of said creditors.

And your orator further charges that, even if said trustees can surmount the embarrassments and difficulties which they allege have prevented them hitherto from realizing said assets, the
8 amount which can be realized from all the property which passed to said trustees and which could under any circumstances be realized by them would be entirely inadequate to pay the just debts of said company—

For your orator is advised and respectfully submits that by the true construction of said deed of trust no part of the eighty per cent. of subscriptions to said capital stock which had not been called

for by said company from its subscribers passed to said trustees, nor any power to sue for or collect said subscription so uncalled for, but that the relations between said company and its subscribers and their legal rights and obligations as to said uncalled-for part of said subscriptions remained unaffected by said deed of trust.

And your orator is advised and respectfully submits that under said deed of trust, assuming the same to be valid, said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber, and your orator is advised and respectfully submits that said company could not sue one of its subscribers for his subscription unless and until said company has first made an assessment or call upon such subscriber therefor; and so your orator is advised and respectfully submits that, allowing said deed to have full legal validity everywhere and allowing said trustees to proceed without impediment to collect all debts due the company collectible by them, it is manifest that the provisions of said deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors, your orator charges, are in very needy circumstances, and all of whom have waited nearly five years for the satisfaction of their just demands.

And your orator further charges that even if said company were now to levy an additional assessment upon its stockholders it is doubtful whether the right to sue for and collect such assessment would rest in said trustees under said deed, and in attempting to collect the same said trustees would meet with this additional embarrassment besides those which they allege have attended their efforts to collect the calls already made and unpaid at the date of said deed and which were intended to be conveyed to them by said deed.

And your orator further charges that if it be held that any new call were to be made by said company — would not pass to said trustees and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call from its solvent stockholders, and much
9 thereof would be lost in the expenses of litigation and an equitable and just division thereof among the creditors would be wholly defeated, as your orator further charges that a large part of the debts of said company are [is] too small to justify the holders of them, who are poor men, in entering upon such a race of diligence.

And your orator further charges that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company; and he is advised and respectfully submits that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And he further represents that, inasmuch as the stockholders re-

side within different jurisdictions, it is impossible for the creditors to make them all defendants in any one court and compel an equitable contribution from them to raise a fund sufficient to pay the debts of said company.

And he is advised that to proceed against the stockholders who are within the jurisdiction of each court would increase litigation and would lead to other injurious consequences—

For your orator is advised that should the creditors proceed against the stockholders within the jurisdiction of any one court they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute to resort to stockholders elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And your orator is advised and respectfully submits that in view of the difficulties and embarrassments which are alleged by said trustees to have attended their efforts to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view of the further and additional difficulties that would attend any attempt on the part of the said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss, and injustice that would attend an attempt on the part of said company to collect such new call as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders directly in the different States and jurisdictions in which said stockholders reside, and in view of the unquestionable right of said creditors, in some form, to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

10 And he is advised and respectfully submits that said creditors are entitled to have an account taken of the debts of said company and of the assets now available for the payment of the same other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the amount so required a proper allowance should be made for probable losses by insolvency of stockholders and otherwise and for the expenses of collecting the same and of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons, to be appointed by this court, with adequate authority and power to sue for, collect, and receive the same, and bring the same into this court to await its further order.

And your orator further charges that before the questions relating to the powers, rights, and obligations of said trustees under said deed

of trust can be finally decided there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And he is further advised that he and the other creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder and the rights of the creditors ascertained and defined.

And he is advised that, as said company is a Virginia corporation and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this State will be respected and enforced in the courts of other States when said deed may be drawn in question, so far as the law of Virginia with reference to said deed may not conflict with the positive law of such other States.

And so your orator is advised and submits that he and the other creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And your orator further charges that there has not been recently any election of officers by said company; but he is advised that under its charter and the laws of Virginia the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the power of such officers.

And he is further advised and submits that under the laws of Virginia the corporate franchises of said company and its exist-
11 ence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And your orator charges that William H. Perot, of Baltimore, is the president of said company, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Jos. R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, whose residence is unknown to your orator.

The principal office of said corporation is in the city of Richmond, in the State of Virginia.

Forasmuch, therefore, as your orator and the other creditors of said company are without remedy in the premises save in a court of equity, and to the end that an account may be taken of the debts due by said company, and that said trustees may state what amount, if any, of money or other property they have received for the payment of the debts of said company, and what payments they have made and what debts and other property or money belonging to said company they now hold under said deed of trust, and that an account may be taken of such available assets of said company as may now be held by said trustees, and of the subscriptions yet unpaid and uncalled for, and of the value thereof, and that the amount necessary to be assessed upon the solvent subscribers of said company in order to provide means for the pay-

ment of its debts and of the expenses of collecting and administering the same may be ascertained, and that said board of directors of said company may be decreed to levy an assessment or to make a call upon the subscribers for payment of a sufficient amount of their unpaid and uncalled-for subscriptions to pay the said debts and all necessary expenses, in case said board of directors shall otherwise be unwilling or fail to take such account and to make such call voluntarily.

And that the validity, effect, and scope of said deed of trust may be ascertained and pronounced upon by this court, and the powers, duties, and rights of the trustees and of the creditors of said company thereunder may be ascertained and interpreted and the execution of said trust, if the same be held valid, be decreed, and that in the meantime a receiver or receivers *ad litem* may be appointed by this court with power and authority to receive, sue for, and collect and reduce to money all debts, choses in action, and claims now in the hands of said trustees, and to take possession of and sell all property vendible in its nature held by said trustees, and with full power and authority to sue for, receive, and collect any moneys that may become due from any stockholders of said company upon any new or additional calls that may be made by said company upon said stockholders, and that said trustees and
12 said company may be required to execute and deliver to said receiver or receivers or trustees *ad litem* any and all assignments, deeds, and conveyances as may be necessary to vest such receiver or receivers or trustees *ad litem* with legal power and authority to sue for, demand, and receive such debts or other property of said company, or that, in case the same be necessary, *that* such receiver or receivers or trustees *ad litem* may be authorized to use the names of said trustees or of said company in prosecuting any suits or actions that may be necessary to compel payment of any debts due said trustees or said company or to reduce its property to possession, and that such receiver or receivers or trustees *ad litem* may bring into this court to await its final order any and all moneys received or collected by him or them under said decree or order, and that your orator and the other creditors of said company may have such other or further relief as the equity of the case may require and to your honor may seem meet. May it please your honor to grant unto your orators the writ of subpœna to the said The National Express and Transportation Company and to the officers and directors thereof, above named, and to the said John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly to be directed, commanding them to be and appear in this court and answer fully in the premises and show cause, if any they have, why a decree should not be passed as prayed and your orator have the relief he seeks.

And your orator, as in duty bound, will ever, &c.

MARSHALL & FISHER.
JOHN HOWARD, *P. Q.*

COMPLAINANT'S EXHIBIT W. W. G. No. 1.

In the Superior Court of Baltimore City. May Term, 1870.

W. W. GLENN
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

29th April, 1869. Nar., 3 prom. notes, 3 protests, acc't and affi't f'd. Sum'd by service on Wm. H. Perot, president.

8th June, 1869. Judgment by default for want of plea and affidavit.

24th June, 1870, judgment by default extended for $42,501.31 damages assessed by the court, with int. from 24th June, 1870, and costs.

Order of court f'd.

Plaintiff's costs, $8.65; defendant's costs, $5.30.

13 STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that the aforegoing is a true short copy of the judgment in the above-entitled cause, taken from the record of the proceedings of the superior court of Baltimore city; and I hereby further certify that said record contains no proceeding or entry to show that the judgment aforesaid has been satisfied either in whole or in part.

In testimony whereof I hereto set my hand and affix the seal of the said court this 23d day of October, A. D. 1871.

[L. S.] GEORGE ROBINSON,
Clerk of the Superior Court of Baltimore City.

COMPLAINANT'S EXHIBIT W. W. G. No. 2.

This deed, made the 20th day of September, A. D. 1866, between the "National Express and Transportation Company," a body politic and corporate under the laws of the State of Virginia, of the first part, and John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, of the second part, witnesseth: That, in consideration of the trusts hereinafter declared and of one dollar paid to the said party of the first part by the said parties of the second part, the party of the first — doth hereby grant, bargain, sell, convey, assign, and set over unto the said parties of the second part all the estate, property, rights, and credits of the said party of the first part, of every kind and wherever situated in or out of the State of Virginia, including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects and moneys payable to the company, whether on calls or assessments on stock of the company or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A and annexed hereto, as soon as can be conveniently done, but the omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned; but this deed is made on the following trusts—that is to say:

First. That the said parties of the second part, hereinafter called the trustees, shall permit the said party of the first part to remain in the possession and use of all the property herein granted or assigned, except debts, claims, and moneys payable, until the first day of November, A. D. 1866, and thereafter until the trustees shall be requested by one or more of the creditors hereby secured, and whose debt or debts shall then be due, to take possession of such property; but the trustees shall take possession thereof at any time
14 after the date of this deed, if requested so to do by the board of directors of said party of the first part.

Secondly. That the trustees shall proceed without unnecessary delay to collect all the debts, claims, and moneys payable which are hereby granted or assigned.

Thirdly. That as soon as the trustees shall be authorized under the foregoing provisions to take possession of the other property hereby granted or assigned they shall take possession thereof and sell the same at public or private sale, in such manner as they shall deem best, for ready money or on reasonable credit with good security.

Fourthly. That the trustees shall have authority to employ at the expense of this trust such agents, clerks, counsel, attorneys, and servants as they shall deem necessary for the proper execution of the trusts of this deed, and to incur such other reasonable expenses as they shall deem necessary for that purpose.

Fifthly. That out of the moneys which shall arise or come to the possession of the trustees under or by virtue of this deed they shall pay, first, the expenses of this trust, including the cost of preparing, stamping, and recording this deed, and a commission of five (5) per cent. to the trustees on the money received, and next they shall pay all debts now due or which shall become due from the said party of the first part to its officers and employees for their services as such on or before the first day of November next or such previous time as the trustees are required to take possession of all the property hereby granted as aforesaid.

Sixthly. Out of the remainder of such moneys the trustees shall next pay in ratable proportion the two debts which it now owes, one to the Baltimore and Ohio Railroad Company and the other to the Bank of Commerce (of Baltimore), the same being the principal debts due by the said party of the first part, but the precise amounts of which cannot now be exactly stated.

Seventhly. That out of the remainder of such moneys the trustees shall pay all debts of the said party of the first part for which any officer or director of the company is now liable as indorser or surety for the said party of the first part.

Eighthly. That out of the remainder of such moneys the trustees shall pay in ratable proportion the balance of all debts for which the said party of the first part shall become liable to any railroad companies for transportation of express matter after the date of this deed; and on or before the first day of November next, after first applying to said debts the net proceeds according [accruing] to the said party of the first part from such transportation, such net proceeds

being what may remain of the compensation received for such transportation after paying the current expenses of the business and notwithstanding anything hereinbefore contained, the said
15 party of the first part shall have a right to receive all tolls and compensations accruing for the transportation of express matter not yet delivered to consignees or not yet transported, although under existing contracts.

Ninthly. That out of the remainder of the moneys which shall arise and come to the possession of the trustees under this deed they shall pay (so far as such remainder shall be sufficient) all other debts and liabilities of the said party of the first part now existing in ratable proportion, so far as such debts and liabilities shall be made known to the trustees, within ten months after the date of this deed or before they shall have distributed any money under this ninth clause.

Tenthly. That any moneys remaining in the hands of the trustees herein named, after satisfying the foregoing trusts, shall be paid to said party of the first part.

In testimony whereof Joseph E. Johnston, president of the said National Express and Transportation Company, by virtue of authority in him vested by an order and resolution of the board of directors of said company, hath affixed the common seal of said corporation to this deed as the act and deed of said corporation; and, as evidence thereof, he also subscribes his name hereto the day and year above written.

[L. S.] J. E. JOHNSTON,
President, &c.

CITY OF RICHMOND, *State of Virginia:*

I, Roger J. Page, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Joseph E. Johnston, president of the National Express and Transportation Company, whose name is signed to the writing above, bearing date September 20th, 1866, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this 20th day of September, A. D. 1866.

(Signed) ROGER J. PAGE, *N. P.*
(Signed) J. E. JOHNSTON.

CITY OF RICHMOND, *To wit:*

In the office of the court of hustings of the said city the 21st day of September, 1866—

This deed was presented and, with the certificate annexed,
16 admitted to record at forty-five minutes past 6 o'clock p. m.

Teste: RO. HOWARD, *Cl'k.*

A copy. Teste: BENJ. H. BERRY,
Cl'k Ch'y Ct., Richmond.

I, Samuel M. Evans, clerk of the circuit court of Baltimore city, do certify that the foregoing is truly copied from the original filed in said cause.

In testimony whereof I hereunto set my hand and affix the seal of the said court this 16th day of February, A. D. 1867.

[L. S.] SAMUEL M. EVANS, *Clerk.*

And the subpœnas having been returned executed on Jos. R. Anderson and M. G. Harman, it was ordered that, unless they should appear at the then next rules and plead, answer, or dumur to the plaintiff's bill, the same would be taken for confessed as to them, and the matters thereof decreed accordingly; and the cause was continued for directions as to the other defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in December, 1879—

The defendants, Jos. R. Anderson and M. G. Harman, still failing to appear, plead, answer, or demur to the plaintiff's bill, the bill was taken for confessed, and, on motion of the plaintiff's counsel, the cause was set for hearing as to them and continued for directions as to the other defendants.

And at another day, to wit, on the 4th day of August, 1879—

Came the plaintiff, by counsel, and filed his amended and supplemental bill; which bill and the exhibits therewith are in the words and figures following, to wit:

Amended and Supplemental Bill.

In the Chancery Court of the City of Richmond.

JOHN W. WRIGHT, Sheriff, &c., and Adm'r of W. W. Glenn,
Who Sued, &c.,
vs.
THE NATIONAL EXPRESS and TRANSPORTATION COMPANY.

RICHMOND, VA.

17 By way of amendment and supplement to the original bill heretofore filed in this honorable court in the above-entitled cause by William W. Glenn, now deceased, in behalf of himself and other creditors of the National Express and Transportation Company against the said company and others, John W. Wright, sheriff of the city of Richmond aforesaid and as such administrator in Virginia of the estate of the said William W. Glenn, dec'd (the said suit having been revived and ordered to proceed in the name of said Wright, sheriff and administrator as aforesaid), respectfully states and charges that the said judgment, mentioned and set forth in said original bill as having been obtained by the said Glenn against the said company, is still unsatisfied, and that neither the said company nor any of its officers or agents has made any effort to satisfy or done anything looking to the satisfaction of the same, in whole or in part. On the contrary, alike the said company, its officers and agents, and its trustees, the said John Blair Hoge, J. J.

Kelly, and C. Oliver O'Donnell, have neglected, failed, and refused to take any step towards the satisfaction and payment of said debt. Meanwhile many of the stockholders of said company have become insolvent or bankrupt, and others have departed this life, leaving their estates in confusion; and all of the reasons which originally made it proper for this court to grant the relief prayed for in said bill now exist with greatly increased strength and urgency. Indeed, instead of doing their duty in the premises the said company and its said trustees have rather set the creditors at defiance than made any effort to pay the corporate debts, and alike by their delay and non-action and by their obstruction of action on the part of the creditors, including the said W. W. Glenn, have seriously imperilled the payment of said debts.

The books of the said company are in the possession of said trustee, John J. Kelly, who was the last superintendent of the company, and he both refuses to submit them to the inspection of the creditors of the company and to allow copies to be made for their use; but a copy has now been obtained of the list of stockholders, and if the original books cannot be obtained your complainant is advised that this copy may be used in the case. It will be produced and filed in this cause when needed or required.

The said John Blair Hoge and John J. Kelly, trustees in said deed of trust, are non-residents of this State. Said C. Oliver O'Donnell, who was the other trustee in said deed, is dead, and his estate has been committed to the sheriff of the said city of Richmond, who, by statute in such case made and provided, may, as his personal representative, execute, so far as said O'Donnell is concerned, the trusts of said deed, or this honorable court may appoint another trustee or trustees, if necessary, in the place of the said O'Donnell and of the said John Blair Hoge and John J. Kelly, who refuse or fail to act and who are out of the jurisdiction of the
18 court, for your complainant is advised and insists that the trusts of said deed, whatever they may be, will not be permitted to fail because either of the absence, non-residence, recusancy, death, or other default or disability of said trustees or of any of them, and that, if necessary or proper for the protection and realization of the rights of the creditors of said corporation, all of the property and estate of every kind of the said corporation, which has long ceased to exercise its franchises or to do business, will, as a trust fund for the payment of the corporate debts, be directed to be conveyed (by a commissioner appointed for that purpose) either to a new trustee *eo nomine* or to such receiver or receivers as the court may appoint, who shall be clothed with full powers to collect all the assets of the corporation and be required to bring the proceeds into court for the satisfaction of the corporate creditors.

And your complainant is further advised and insists that if, upon due requirement thereto, the said company should further fail to make such assessment upon its stockholders as may be necessary to pay its corporate debts it will be within the rightful jurisdiction and province of this honorable court, in furtherance of justice, to order and require such assessment to be made under its direction by one

of its master commissioners or otherwise, and the said assessment to be collected by due legal process and applied to the payment of said debts.

Your complainant is advised that such a course is within the legitimate jurisdiction and established practice of a court of equity, and certainly the circumstances of this case call strongly for the vigorous exercise of all necessary powers of remedial relief.

Said corporation, national in name, but southern in its origin and affinities, set out on its career in the fall of 1865 with the most brilliant and ambitious prospects. By many, perhaps by most, indeed, who subscribed for its stock it was thought to be a great money-making scheme, and it did not hesitate to incur a large indebtedness in the establishment and carrying on of its business. This in great part it was enabled to do by the warm sympathy, good wishes, and hearty co-operation of many of the worthiest, most intelligent, and patriotic citizens and institutions of the land, from whom it received encouragement and credit in a liberal manner; and such, in fact, was the reality and the promising outlook of its large and prosperous business that, as appears by the said original bill, only a small part of the subscriptions to the capital stock was called for or paid in; but by the most unbusinesslike and culpable negligence and mismanagement the great and useful enterprise was suffered to fall through in November, 1866, and its numerous friends and creditors—many of them creditors because friends—were left in the lurch, and have been permitted to remain so ever since; nay, while the company has, as above stated, itself done nothing towards the payment of its debts but the execution of the deed of trust aforesaid, the said trustees in said deed have wholly failed and refused to execute the provisions of said deed, though often requested thereto by the said W. W. Glenn and other creditors of the said company.

19

Among the claims against the said company it is believed that there are none more meritorious than that of the said Glenn, which is for money paid as endorser for said company and for money lent, &c. Your complainant herewith files a complete transcript of the record in the case of the said Glenn against the said company in the superior court of Baltimore city, in the State of Maryland, in which the said judgment mentioned in the said original bill was obtained, which transcript is marked "R," and is prayed to be taken as part of this amended and supplemental bill. The said judgment, as will be seen by an inspection of said record, was founded upon three several negotiable notes, made by the said company and endorsed and paid by the said Glenn, after due protest of the same, and an account for money lent, &c., which said notes and account are duly set forth in said transcript, and proof of which said original causes of action will be furnished if required.

In consideration whereof your complainant prays that the said National Express and Transportation Company and the other persons mentioned as parties defendant in said original bill (with the exception of the said M. G. Harman, who is dead), namely, William H. Perot, of Baltimore, Maryland, president of said company;

William Devries and D. J. Foley, of Baltimore, Maryland; Joseph R. Anderson, of Richmond, Virginia; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; William H. Webb, of New York, and Lorenzo Norvell, of Lynchburg, Virginia, who are directors of said company; M. B. Poiteaux, of Richmond, Virginia, cashier and treasurer of said company, and John Blair Hoge, of West Virginia, and John J. Kelly, of New York, surviving trustees in said deed of trust in the proceedings mentioned, and, if deemed necessary or proper, John W. Wright, sheriff of the city of Richmond and as such administrator of said C. Oliver O'Donnell, dec'd, late one of the trustees in said deed, may be made parties defendant to this amended and supplemental bill, the said non-residents of the State of Virginia, by an order of publication duly made, and may be required to answer the same and said original bill; that the said claims of the said W. W. Glenn and other creditors of said company may be established and decreed to be paid; that all of the prayers in said original bill contained may be granted, as if the same were herein repeated; that the said trustees, John Blair Hoge and J. J. Kelly, may be required to deliver up and surrender to this court all of the books of said company of every kind and description that came into their hands or into the hands of either of them; that the said trustees be removed from office, and, if necessary, another trustee or other trustees may be substituted in their place and stead, and the property and estate embraced in said deed of trust be conveyed to such substituted trustee or trustees or to such receiver or receivers as may be appointed by the court; that all proper process may issue; that all proper orders and decrees may be made, and that all such other, further, and general relief may be granted to your complainant and to the other creditors of the said National Express and Transportation Company as the nature of the case may require and to equity may seem meet, as he will ever pray, &c.

JOHN HOWARD, *P. Q.*

EXHIBIT "R," with Amended and Supplemental Bill.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

At a session of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house, in the city of Baltimore, in and for the city aforesaid, on the second Monday of May (being the ninth day of the same month), in the year of our Lord one thousand eight hundred and seventy—present, the Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city; Augustus Albert, Esq., sheriff; George Robinson, clerk—among other, were the following proceedings, to wit:

WILLIAM W. GLENN, Plaintiff,
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, the said William W. Glenn, by Charles Marshall and William A. Fisher, Esqrs., his attorneys, prosecuted and sued forth out of the court here the writ of the State of Maryland of summons, directed to the sheriff of Baltimore city, in the words and of the tenor following, to wit:

21 *Writ of Summons.*

[L. S.] BALTIMORE CITY, *To wit:*

State of Maryland to the sheriff of Baltimore city, Greeting:

You are hereby commanded to summon the National Express and Transportation Company, a body politic and corporate of the State of Virginia and late holding and exercising franchise in the State of Maryland, of Baltimore city, to appear before the superior court of Baltimore city, to be held at the court-house, in the same city, on the second Monday of May next, to answer an action at the suit of William W. Glenn; and have you then and there this writ.

Witness the Hon'able T. Parkin Scott, chief judge of the supreme bench of Baltimore city, the 11th day of January, 1869.

Issued 29th day of April, 1869.

GEO. ROBINSON, *Clerk.*

And the said plaintiff, at the same time of bringing his action aforesaid, declared against the said defendant, and at the same time also filed therewith an affidavit with three promissory notes, three protests, and account; which declaration, promissory notes, protests, accounts, and affidavits are in the words, figures, and tenor following, to wit:

Declaration.

In the Superior Court of Baltimore City.

BALTIMORE CITY, *To wit*:

William W. Glenn, by Marshall and Fisher, his attorneys, sues the National Express and Transportation Company, late a body politic and corporate of the State of Virginia and late holding and exercising franchises in the State of Maryland:

1. For money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

2. Work done and materials provided by the plaintiff for the defendant at its request.

3. Money lent by the plaintiff to the defendant.
4. Money paid by the plaintiff for the defendant at its request.
5. Money received by the defendant for the use of plaintiff.
6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

22 7. That the defendant, on the twenty-eighth day of April, 1866, by its promissory note, now overdue, promised to pay to the plaintiff or order $5,000, at the Bank of Commerce, Baltimore, Maryland, four months after date, but did not pay the same.

8. That the defendant, by its other promissory note, now overdue, on the ninth day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,660.00, without offset, at the Bank of Commerce, in Baltimore, on or before the 6th day of April, 1867, and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

9. That the defendant, by its other promissory note, now overdue, on the 9th day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,843.34, without offset, at the Bank of Commerce, in Baltimore, on or before the sixth day of August, 1857, and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

And the plaintiff claims $50,000.

MARSHALL & FISHER,
Attorneys for Plaintiff.

(Accompanying the said declaration were copies of the promissory notes upon which it was based, with the protests thereupon, together with an account stated of the aggregate claim of the plaintiffs, amounting at that time to $40,021.84.)

Affidavit.

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

I hereby certify that on this twenty-sixth day of April, 1869, before me, the subscriber, a justice of the peace of said State, in and for the city aforesaid, personally appeared William W. Glenn and made oath on the Holy Evangely of Almighty God that there is justly due and owing by the National Express and Transportation Company, the defendant within named, to him, the plaintiff in this cause, on the annexed account and notes, the sum of forty thousand and twenty-one dollars and eighty-four cents (including
23 interest to this 26th day of April, 1869), over and above all discounts, to the best of his knowledge and belief.

GEO. McCAFFRAY, *J. P.*

A copy of which said declaration was made and sent with the said writ to the sheriff of the city aforesaid, thereon endorsed: So served on the defendant with the writ.

At which mentioned second Monday of May, in the year aforesaid, being the day of the return of the foregoing writ, comes into

court here the said plaintiff, by his attorneys aforesaid, and the sheriff of Baltimore city aforesaid, to wit, John W. Davis, gentleman, to whom the foregoing writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

"Summoned by service on William H. Perot, president. Copy left.

"JOHN W. DAVIS, *Sheriff.*"

And the said defendant, being called, appears in court here, by John Stewart and J. Blair Hoge, Esqrs., its attorneys.

And thereupon, in pursuance of the statute in such case made and provided, further day is given to the said defendant at any time before the second Monday in June next to file a plea, etc., or judgment by default will be rendered against it.

The same day is given to the said plaintiff then and there, &c.

At which said second Monday of June, in the year aforesaid, came into court here the said plaintiff, by his attorneys aforesaid.

And the said defendant comes not, but makes default.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant.

But because it is unknown to the court here what damages the said plaintiff hath sustained, a day is given to the said parties before the court here on the second Monday in September next to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

At which said second Monday of September, in the year aforesaid, comes into court here the said plaintiff, by his attorneys aforesaid, but the said defendant comes not.

And because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties before the court here on the second Monday of January next to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

24 At which said second Monday of January, in the year of our Lord eighteen hundred and seventy, comes again into court here the said plaintiff, by his attorneys aforesaid; but the defendant comes not.

And because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties before the court here, on the second Monday in May next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

And now at this day, to wit, the said second Monday of May, in the year last aforesaid, comes again into court here the said plaintiff, by his attorneys aforesaid.

But the defendant comes not.

Thereupon the said plaintiff, by his attorneys aforesaid, prays that the court assess his damages.

Whereupon the court here assess the damages of the said plaintiff on account of the premises and file in said cause the following order, to wit:

Order of Court. Filed 24th June, 1870.

In the Superior Court of Baltimore City.

W. W. GLENN
vs.
NATIONAL EXPRESS AND TRANSPORTATION CO.

Judgment by default June 8, 1869.

Upon legal and satisfactory proof of the correctness and amount of the claim for which the above suit was brought being produced to the court, it is ordered this twenty-fourth day of June, 1870, that the judgment by default in this cause be extended for 42,531 dollars 31 cents, damages assessed by the court.

GEORGE W. DOBBIN.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of forty-two thousand five hundred and thirty-one dollars and thirty-one cents, with interest from the twenty-fourth day of June, eighteen hundred and seventy, as the sum of eight dollars and sixty-five cents for his cost and charges by him about his suit in this behalf laid out and expended; and the said defendant, in mercy, &c.; and the said plaintiff have thereof his execution, &c.

25 *Memorandum.*

Final judgment was rendered in this case on the 24th June, 1870, for the plaintiff for $42,531.31, the damages assessed by the court, with interest from the 24th day of June, 1870, and costs.

Costs, $8.65.

STATE OF MARYLAND, *City of Baltimore*, } *sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore city, do hereby certify that the aforegoing is a full, true, and entire transcript taken from the record and proceedings of the said court in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city aforesaid on this first day of July, eighteen hundred and seventy-nine.

[SEAL.] F. A. PREVOST, *Clerk.*

MARYLAND, *sct:*

I, George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city and the eighth judicial circuit of said State, do certify that the foregoing attestation of Francis A. Prevost, clerk of the said superior court of Baltimore city, is in due form and by the proper officer.

Given under my hand at the city of Baltimore this first day of July, in the year one thousand eight hundred and seventy-nine.

GEORGE W. DOBBIN.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore city, do hereby certify that the Honorable George W. Dobbin, who has certified and signed the above attestation, was, at the time of so doing, presiding judge of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, duly commissioned and qualified, and that to all acts done by him in that capacity full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof I hereunto subscribe my name and
26 affix the seal of the superior court of Baltimore city on this first day of July, A. D. eighteen hundred and seventy-nine.

[SEAL.] FRANCIS A. PREVOST,
Clerk of the Superior Court of Baltimore City.

And thereupon subpœnas in chancery were issued against the defendants, directed to the sheriffs of the cities of Richmond and Lynchburg, returnable to 1st September rules; which subpœnas and the returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Poiteaux and John Blair Hoge and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer an original, amended, and supplemental bill in chancery exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company.

And have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Returns.

Executed Aug. 8, 1878, by delivering to Joseph R. Anderson and M. B. Poiteaux each a copy of the within.

L. P. WINSTON, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

Executed in the city of Richmond Aug. 8, 1879, as to the
27 National Express and Transportation Company, by delivering to Jos. R. Anderson, a director, and M. B. Poiteaux, cashier, of the said company, each a copy of the within s'p'a in chancery, each of whom is resident of said city of Richmond, the president not being a resident of the city of Richmond. The other defendants are no inhabitants.

L. P. WINSTON, *D. S.*,
For JOHN W. WRIGHT, *S. C. R.*

The Commonwealth of Virginia to the sheriff of the city of Lynchburg, Greeting:

We command you that you summon Lorenzo Norvell to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer original and amended and supplemental bill in chancery exhibited against him and others in our said court by John W. Wright, sheriff of the city of Richmond and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Return.

Executed August 6th, 1879, on Lorenzo Norvell by delivering to him a true copy of the within summons.

M. J. DAY, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

And affidavit having been made and filed that the defendants, Wm. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J. Kelly, are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

And at another day, to wit, at rules held in the clerk's office of the said court on the first Monday in September, 1879.

Came the defendant, M. B. Poitiaux, by counsel, and filed his answer to the plaintiff's bill; to which answer the plaintiff re-
28 plied generally, and the same is in the words and figures following, to wit:

Answer of M. B. Poitiaux.

To the Hon. E. H. Fitzhugh, judge of the chancery court of the city of Richmond:

The answer of M. B. Poitiaux, one of the defendants in a suit now before your honor, John W. Wright, sheriff of the city of Richmond and as such administrator of W. W. Glenn, deceased, who sues, &c., &c., against the National Express and Transportation Company, W. H. Perot, M. B. Poitiaux, and other defendants.

For answer your respondent would say that he was the cashier of the first division of the said National Express and Transportation Company, his office being in the city of Richmond at the time of the conveyance executed by the said National Express Company to John J. Kelly, John Blair Hoge, and Columbus O. O'Donnell, trustees; that he had been cashier as aforesaid for some four or five months previously; that the said first division comprised the States of Virginia, North Carolina, part of South Carolina, and Bristol, Tennessee; that the said National Express and Transportation Company is in debt to your respondent as of the 31st day of January, 1867, in the sum of three hundred dollars for arrearages of his salary due and unpaid, and in the further sum of twenty-seven dollars and twenty-five cents for monies advanced by him to pay sundry petty expenses in the office of the company, and which have never been refunded to him; that he has no books and papers in his possession belonging to the said Express and Transportation Company; that he does not know anything about the transactions of the said trustees nor in whose possession the books and papers now are or what has become of them; that he is not now nor ever was a stockholder in the said National Express and Transportation Company; and, having fully answered, prays to be hence dismissed, &c.

M. B. POITIAUX.

STATE OF VIRGINIA, *City of Richmond*, } *To wit:*

This day personally appeared before me, J. L. Williams, a notary public in and for the city aforesaid, M. B. Poitiaux, and made oath in due form of law that the statements made in the foregoing answer are true.

Given under my hand this 30th day of August, 1879.

J. L. WILLIAMS,
Notary Public.

29 And the subpœnas having been returned executed on Joseph R. Anderson, M. B. Poitiaux, The National Express and Transportation Company, and Lorenzo Norvell, and these defendants, except M. B. Poitiaux, failing to appear, it was ordered that unless they should appear at the then next rules and plead, answer, or demur to the plaintiff's bills the same would be taken for con-

fessed as to them and the matters thereof decreed accordingly; and the cause was continued for proof of the publication and posting of the order heretofore made in this cause as to the non-resident defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in September, 1879.

The defendants, Joseph R. Anderson, The National Express and Transportation Company, and Lorenzo Norvell, still failing to appear, pear, plead, answer, or demur to the plaintiff's original and amended and supplemental bills, the same were taken for confessed, and on motion of the plaintiff, by counsel, the cause was set for hearing as to them and M. B. Poitiaux, and the cause was continued for proof of publication and posting of the order heretofore made as to the non-resident defendants.

And at another day, to wit, in the clerk's office of the said court on the 6th day of October, 1879.

Proof of the publication and posting of the order made herein on the 4th day of August, 1879, and also of the subpœna in chancery issued herein on the 5th day of August, 1879, having been filed, on motion of the plaintiff's counsel the cause was set for hearing as to all the defendants.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon The National Express and Transportation Company, Wm. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Portiaux, John Blair Hoge and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer original, amended, and supplemental bill in chancery exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the court-house, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

A copy.
Teste: BENJ. H. BERRY, *Clerk.*

In the clerk's office of the chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did, on the first day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front

door of the new city hall, in which said hustings court holds its sessions.

J. T. POINDEXTER,
Dep. Clerk.

I hereby certify that the summons hereto attached of Berry, clerk of court, in suit of Wright *vs.* National Transportation Co. and others was published in "The State" newspaper once a week for four weeks, the first insertion being on the 5th day of August, 1879.

JNO. HAMPDEN CHAMBERLAYNE,
Ed'r, &c.
CHAMBERLAYNE & BEIRNE,
Ed'rs and Prop'rs.

VIRGINIA:

In the Clerk's Office of the Chancery Court of the City of Richmond, August 5, 1879, in Vacation.

JOHN W. WRIGHT, Sheriff of the City of Richmond and as such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Plaintiffs,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, M. B. Portiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

In chancery on original, amended, and supplemental bill.

The object of this suit is to obtain a construction and enforcement of the deed of trust, in the proceedings mentioned, from the National Express and Transportation Company to the defendants, John Blair Hoge and John J. Kelly and another, to remove said Hoge and Kelly as trustees in said deed, and to subject all of the property, estate, and rights of every kind of said company to the
31 payment of the debts of the plaintiff and other creditors of said company, and, in furtherance thereof, to appoint a receiver or receivers, with due powers to collect and make available such property, estate, and rights; and affidavit having been made and filed that the defendants, Wm. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J. Kelly, are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

A copy.
Teste: BENJ. H. BERRY, *Clerk.*

JOHN HOWARD, *P. Q.*

I hereby certify that the notice hereto attached of Benj. H. Berry, clerk, John Howard, P. Q., in suit of Wright, adm'r, *vs.* The National

Express and Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 6th day of August, 1879.

RICHARD F. BEIRNE,
Editor, &c., for Chamberlayne & Beirne, Owners and Editors of "The State."

In the Clerk's Office of the Chancery Court of the City of Richmond, the 29th Day of September, 1879.

John A. Meanley this day made oath before me that he did, on the 1st day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front door of the new city hall, in which said hustings court holds its session.

J. T. POINDEXTER,
Dep. Clerk.

And at the same day, to wit, at a chancery court of the city of Richmond continued by adjournment and held for said city on the 6th day of October, 1879.

JOHN W. WRIGHT, Sheriff of the City of Richmond and as such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Co., Plaintiff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION CO., W. H. PEROT, Wm. Devries, D. J. Foley, Jos. R. Anderson, F. P. Zimmerman, J. Carter Mowbray, W. H. Webb, Lorenzo Norvell, M. B. Poitiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

32 This day this cause came on to be heard upon the original and amended bills taken for confessed as to all of the defendants except M. B. Poitiaux and Joseph R. Anderson, upon the several answers of the said Poitiaux and Anderson (that of the said Anderson being this day filed by leave of court), with replications thereto and exhibits filed, and was argued by counsel.

On consideration whereof it is adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

1. An account of the debts due by the said defendant, The National Express and Transportation Company, and the priorities thereof, if any.

2. An account of the assets of said defendant company.

And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties.

Any party to the cause may be examined before such commissioner, and all or any books, papers, and documents of the said defendant company in the possession of any party may be called for and required to be produced.

And it is further ordered that notice of the time and place of taking the said accounts be published once a week for four successive weeks

in the State newspaper, published in the city of Richmond, and that such publication shall be equivalent to personal service of such notice on the parties to this cause.

The answer of Joseph R. Anderson referred to in foregoing decree is in the words and figures following, to wit:

Answer of Jos. R. Anderson.

To the Hon. Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

The separate answer of Joseph R. Anderson, one of the defendants, to an original, amended, and supplemental bill of complaint exhibited against him and others in the chancery court of the city of Richmond by John W. Wright, sheriff of said city and as such administrator in Virginia of W. W. Glenn, dec'd, complainant.

This respondent, reserving to himself the benefit of all just exceptions to the said original, amended, and supplemental bill, for answer thereto or to so much thereof as he is advised that it is material he should answer, answers and says that he does not admit that he is a director in the National Express and Transportation Company, but that, to the best of his knowledge and belief, he resigned the directorship of the company very soon after his elec-
33 tion thereto; that, moreover, he does not remember ever having acted in the capacity of director of the said company at a single one of its meetings, and he prays to be hence dismissed with his reasonable costs by him in this behalf expended, and he will ever pray, &c.

JOSEPH R. ANDERSON, *Defendant.*
JAMES ALFRED JONES.
J. F. T. ANDERSON, *P. D.*

VIRGINIA,
City of Richmond, } *To wit:*

This day personally appeared before me, Tazewell Ellett, a notary public for the city and State aforesaid, Joseph R. Anderson, whose answer is above written, and made oath that the statements contained in the said answer are true.

Given under my hand this 6th day of October, in the year 1879.

TAZEWELL ELLETT, *N. P.*

(At this point are omitted three petitions filed in the cause in behalf of (1) the Baltimore and Ohio Railroad Company, (2) the Bank of Commerce of Baltimore, and (3) the Philadelphia, Wilmington and Baltimore Railroad Company, praying to be made parties plaintiff in the cause, together with orders *with* the court granting such prayers.)

And at another day, to wit, on the 19th day of June, 1880, a report of Commissioner Otho G. Kean was filed in the cause, and the same and the depositions and exhibits filed therewith are in the words and figures following, to wit:

Report of Com'r Kean.

COMM'R'S OFFICE, 1113 MAIN STREET,
RICHMOND, *June* 19, 1880.

In Richmond Chancery Court.

GLENN'S ADM'R
v.
THE NATIONAL EXPRESS & TRANSPORTATION COMPANY.

To the Hon. Ed. H. Fitzhugh, judge of said court:

By decree of this court entered in the above-styled cause October 6, 1879, it was "adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

"1. An account of the debts due by the said defendant, The National Express and Transportation Company, and the priorities thereof, if any.

"2. An account of the assets of said defendant company.

"And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties." And said decree also provided that such inquiry and report should only be made after the commissioner to whom the cause might go had notified all parties in interest, by publication once a week for four successive weeks in some newspaper published in Richmond, of the time and place fixed on by him for execution of said decree of October 6, 1879. Counsel for
34 complainant having requested me to act in the cause, I inserted a notice in the State, a newspaper published in Richmond, informing all persons interested in the National Express and Transportation Company, whether as creditors or otherwise, that I had fixed on Saturday, November 8, 1879, at ten o'clock a. m., as the time and my office in Richmond as the place for executing the said decree of October 6th, 1879. A copy of this notice, evidenced as the law requires, is hereto annexed.

On the appointed day John Howard, Esq., counsel for complainant, appeared before me, and at his instance the taking of depositions was commenced and continued, with regular adjournments, from time to time, until concluded on May 7, 1880. During this period I took the deposition of quite a number of witnesses, many of whom were formerly officers and employees of the company, received and filed a vast number of exhibits, and also had before me many of the books of defendant company. These depositions and exhibits are herewith returned; the books are not filed with my report because their custodian, Mr. John J. Kelly, of New York, did not feel authorized to part with them. In his testimony, however, and from inspection and examination of the books themselves, I have secured, I think, all that they contain pertinent to this matter. These depositions, books, and exhibits—the latter comprising open accounts, notes, bills of exchange, and judgments, evidencing debts

due by the defendant company—these papers and documents, I say, constituting all the evidence produced before me, I now beg to present the following report in response to the decree of October 6, 1879:

1st. That the account herewith returned marked No. 1 contains an accurate statement of the debts and demands alleged and proved before me against the defendant, The National Express & Transportation Company; that the aggregate indebtedness, as shown by said account, is $509,392.41, distributed under two classes—the first of which foots up $104,911.40; the second, $404,481.01; and that while creditors standing in the same class are to be paid ratably *inter sese*, those standing in the first class are to be paid in full before those in the second receive anything. This discrimination is made by the defendant company itself, as will be seen on reference to the deed by which it conveyed all its assets in trust for benefit of creditors. By the provisions of that deed the Bank of Commerce of Baltimore and the Baltimore & Ohio R. R. Co. are constituted preferred creditors.

2nd. That the assets of the defendant company consist exclusively of what may be raised by assessments on its stockholders.

3rd. And by way of special matter: That the annexed account or statement marked No. 2 shows in condensed* form the
35 number of shares of stock held in the National Express and Transportation Company, where they are held, the par value of such stock, the par value of the same less 20 per cent. heretofore assessed, and which has either been paid in or irrevocably lost, and finally an estimate of the assessment which will be necessary to pay the debts asserted in this suit, together with the expenses of collecting such assessment.

Respectfully submitted,

OTHO G. KEAN, *Comm'r.*

Com'r's fee, $100.

NOTE.—I was requested by counsel to give an estimate of the probable expenses of collecting the assessment on the stock of the def't Co., but on reflection think it better that the amount should be fixed by the court, when the assessment made on account of creditors can easily be enlarged so as to include that on account of costs, &c.

O. G. K, *Comm'r.*

(At this point is omitted "Statement No. 1," referred to in the commissioner's report, being a detail of various claims which make up the aggregate of $509,392.41 reported as due by the company to numerous individuals.)

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*Taken from stock book of Co.

STATEMENT No. 2,

Showing No. Shares Stock Held in Nat'l Ex. & Trans'n Co., Par Value per Share, Aggregate Par Val. of s'd Stock, Where Same is Held, &c.

Where held.	Par value.	No. of shares.
New York	$100 00	12,032
Baltimore	"	4,044
Washington, D. C.	"	1,815
Georgetown, D. C.	"	945
36 Richmond	"	2,349
Staunton	"	1,494
Charlottesville	"	1,585
Lynchburg	"	2,329
Norfolk	"	230
Fredericksburg	"	527
Virginia (miscellaneous)	"	276
Charlotte, N. C.	"	287
North Carolina (miscellaneous)	"	365
Augusta, Georgia	"	2,618
Atlanta, "	"	1,210
Macon, "	"	1,430
Savannah, "	"	290
Rome, "	"	216
Montgomery, Ala.	"	520
Mobile, Ala.	"	142
New Orleans, La.	"	1,863
St. Louis, Mo.	"	3,270
Miscellaneous places	"	207
Total No. shares		40,044

Then 40,044 shares would make the par value of all the company's stock	$4,004,400 00
From which deduct 20 per cent., already paid in or lost	800,880 00
Leaving par val. of unpaid stock to which creditors look	$3,203,520 00

The aggregate of debts, as shown by acc't No. 1, is $509,392.41, which will require an assessment of about 20 per cent. on $3,203,320, the value of unpaid stock, as above reported, after making an extremely moderate allowance for insolvent stockholders. Indeed, I feel very sure that the sequel will show it to be insufficient.

O. G. KEAN, *Comm'r.*

(At this point is omitted a detail of the depositions taken by the commissioner in support of the above report by him as to the indebtedness of the company and as to the other matters embraced in his report.)

37 JOHN W. WRIGHT, Sheriff of the City of Richmond and as Such Administrator of W. W. Glenn, Deceased, Who Sues, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others, Def'ts.

In chancery.

This cause, in which proceedings have been had in the mode prescribed by the statute against the absent defendants, Wm. H. Perot, Wm. Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, and Wm. H. Webb, and which has been regularly matured and proceeded in as to all of the defendants, came on this day to be heard upon the cause set for hearing as to the said absent defendants (M. G. Harman, one of the board of directors of said company, being dead, the suit is abated as to him), and upon the papers formerly read, the answer of the defendant, John Blair Hoge, and the original answer of John J. Kelly, both of which were tendered, to be filed at the last term, and are this day filed *nunc pro tunc*, and the amended and supplemental answer of the said defendant, John J. Kelly, this day filed, the general replications of the plaintiffs to the said revival answers, and upon the report of Master Commissioner O. G. Kean, of the 19th day of June, 1880, and the amended and supplemental report of said commissioner this day filed, to which said several reports there is no exception, and upon exhibits filed, and was argued by counsel. On consideration whereof, and for reasons expressed in writing, filed and hereby made a part of the record, and to be so considered, but not to be entered upon the order book, the court is of opinion (1st) that the deed of trust in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, John J. Kelley, and C. Oliver O'Donnell, trustees, for the benefit of sundry creditors therein referred to, is a good and valid deed under the laws of the State of Virginia, where the said corporation was chartered and had its principal office, and where the said deed was executed, delivered, and recorded, and the court doth so adjudge, order, and decree; and the court is further of opinion (2ndly) that under the laws of the State of Virginia the legal effect of the said deed was to grant, convey, and assign to the said trustees all of the estate, property, rights, and credits of the said company of every kind and wherever situated or being, and that accordingly all of the said estate, property, rights, and credits did pass to and were vested in the said trustees by the said deed, including the credits allowed by statute and by the said company to its
38 stockholders for the uncalled for and unpaid part of their several subscriptions to the capital stock of the said company,

and the right to receive and collect the same according to the terms of said contract of subscriptions for the purposes of said trust, and the court doth so adjudge, order, and decree.

(3.) And the court being of opinion that the preferences provided for by said deed in favor of certain creditors therein referred to are legal and valid according to the laws of Virginia, doth so adjudge, order, and decree.

(4.) And it appearing to the court that said John Blair Hoge and John J. Kelly, surviving trustees in said deed, are willing each to resign and renounce the office of trustee under said deed, and that they are so situated as not to be able efficiently to perform the duties of the same, and that it is right and expedient under all the circumstances that they be relieved from the said trusteeship, the court doth adjudge, order, and decree that the said John Blair Hoge and John J. Kelly, surviving trustees of themselves and C. Oliver O'Donnell under the said deed, bearing date the 20th day of September, 1866, executed to them by the said National Express and Transportation Company in trust for the benefit of its creditors, be, and they are hereby, respectively removed from the office of trustee under said deed.

(5.) And it further appearing to the court that John Glenn, Esquire, of number twelve St. Paul street, in the city of Baltimore and State of Maryland, is a fit and proper person to execute the duties of said trust, it is adjudged, ordered, and decreed that the said John Glenn be, and he is hereby, substituted and appointed trustee in the said deed in the room and stead of the said Hoge and Kelly hereby relieved and removed, and that he be, and is hereby, clothed with all the rights and powers and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein; and the said John Blair Hoge and John J. Kelley are authorized and directed to transfer and deliver to the said John Glenn, substituted trustee as aforesaid, all of the books and papers of the said National Express and Transportation Company of every kind and description and all of the estate and property of said company of every kind and description now in possession of them, the said Hoge and Kelly, or either of them, and the receipt of the said John Glenn to them for the same shall be full acquittance and discharge therefor.

But the said John Glenn is not to take possession of said property, books, and papers or receive any money as such substituted trustee until he or some one for him shall enter into *into* bond with good security before the clerk of this court in the penalty of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such trustee.

(6.) And the court doth approve and confirm so much of said report of Commissioner O. G. Kean filed on the 19th day of
39 June, 1880, as ascertains the debts of said company, and doth adjudge, order, and decree that the said National Express and Transportation Company do pay.

(At this point is omitted the details of the names of numerous creditors of the company, with the amounts decreed to be paid to

each, being in all $509,392.41, as above reported by the commissioner.)

And the court, without at this time specifying or determining the order of priority in which said debts due by the said National Express and Transportation Company shall be paid out of any property and assets conveyed by the said deed of trust of the 20th day of September, 1866, but expressly reserving all such matters for future consideration, doth adjudge, order, and decree that the several classes of debts secured in and by said deed be paid in the order of priority in which it shall hereafter appear, upon inquiry, they are preferred, if such inquiry shall become necessary and proper.

And it appearing to the court that the calls for subscriptions heretofore made by the said company, amounting to twenty per cent., have been exhausted or are now unavailing, and that the said company has now no property or assets out of which said debts or any part of them can be made, except the uncalled-for and unpaid subscriptions to the capital stock, amounting to eighty per cent., the right to receive and collect which, according to the contracts of subscription, as well as the former calls, was conveyed and assigned in trust as aforesaid, and constitute a trust fund in the hands of the subscribers, which is primarily liable for the debts of the company; and it further appearing that [to] the court that by the second and fourth clauses of said deed of trust the trustees therein named were clothed with ample authority and power to collect, by suit or otherwise, all of the debts, claims, and moneys payable to said company which were assigned by said deed; and it further appearing to the court that on account of death, removal, insolvency, and other causes much of said uncalled-for and unpaid subscriptions has been lost and great difficulty has been encountered in realizing what remains good from stockholders scattered in and among so many different and distant localities and States, and that it is necessary and proper that at least thirty per cent. of said subscriptions be now called for and required, in order to meet the debts of said company and the costs and expenses of collecting and administering said fund; and it further appearing to the court that the said company has long since ceased and abandoned its business, and that for about fourteen years there has been no meeting either of the stockholders or of its board of directors, it is adjudged, ordered, and decreed that a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the said National Express and Transportation Company of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of said company and each and every of them and their legal representatives and assigns be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to the said John Glenn, of the city of Baltimore, in the State of Maryland, substituted trustee in said deed of trust from the said company of the 20th day of September, 1866; and the said trustee is hereby authorized and directed to collect and receive the said call and assessment and to take such prompt steps to that end, by suit

or otherwise, and in such jurisdictions, as he may be advised; and if the amount realized from this call and assessment shall prove to be insufficient for the purposes of this decree, liberty is reserved to the said creditors and the said trustee to move the court for such further assessment as may be necessary and proper.

And after paying the necessary and proper costs and expenses of executing this decree the said trustee is directed to deposit his collections in the Planters' National Bank of Richmond to the credit of the court in this cause, or in such other bank as may from time to time be designated by the court, and to file the certificates of such deposits with the clerk of this court; and said trustee will make report to the court, from time to time, of his proceedings under this decree, and will settle his accounts, from time to time, before one of the master commissioners of this court, not permitting any six months to intervene between such settlements, and
41 such commissioner is directed and required to make report to the court of such settlements as soon as made.

And upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

The answer of John Blair Hoge and John J. Kelly, referred to in foregoing decree of Dec'r 14th, 1880, is in the words and figures following, to wit:

Answer.

In the Chancery Court of the City of Richmond, Va.

JOHN W. WRIGHT, Sheriff, &c., and as Such Administrator of W. W. Glenn, Who Sued, &c.,
against
JOHN BLAIR HOGE and JOHN J. KELLY, Impleaded with the National Express and Transportation Company and Others.

The separate and several answer of John Blair Hoge and John J. Kelly, as surviving trustees, named with others as defendants in the bill of complaint originally filed by Wm. W. Glenn as complainant, now deceased, respectfully shows to the court as follows:

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or to so much or such parts thereof as said defendants are advised is material for them to make answer unto, answer and say that these said defendants deny each and every allegation in the complaint made, except such as hereinafter specially admitted.

The said defendants admit that the complainant, William W. Glenn, was, and that his legal representative now is, one of the creditors of said The National Express and Transportation Company, in the bill of complaint mentioned.

And said defendants admit that said National Express and Transportation Company was duly incorporated by the Legislature of the

State of Virginia on the — day of ——, 1865, as in that behalf is alleged in the bill of complaint.

And said defendants admit further that said company accepted said act of incorporation and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company, having become much embarrassed in its affairs and owing large debts to various persons, made and executed a deed of trust for the benefit of its creditors to these defendants, John Blair Hoge and John J. Kelly (and to one C. Oliver O'Donnell,
42 who is named as a defendant, but who, as these defendants are informed and believe, is now dead), dated the 20th day of September, 1866, which thereafter to said trustees was duly delivered and which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere, as in the bill of complaint in that behalf alleged.

And said defendants admit further that the assets of said company, to which its creditors have to look mainly for the payments of their debts, consist now only of the amounts contracted to be paid by the subscribers to its capital stock, as in the bill of complaint in that behalf is alleged.

And said defendants admit that the total number of shares of the stock of said company which had been subscribed for at the date of said assignment was about $40,044, each share being of the par value of $100, and said subscriptions representing the aggregate of about $4,004,400, and that on the 29th day of October, 1866, the condition of said company, with reference to its stock and debts, was and was reported at a meeting of stockholders as in the bill of complaint in that behalf is alleged.

And said defendants admit that the subscribers to the capital stock of said company resided and now reside in many States, and not within the jurisdiction of any one court.

And that by the terms of the subscription the subscribers were bound to pay the amount of said subscription as and when the same should be called for by said company.

And that the total amounts of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of subscriptions, and that the amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth in the bill of complaint.

And that a very small part of the said assessments, to the amount of twenty per cent., which remained unpaid at the date of said report has been since paid or collected from the delinquent stockholders.

And that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remain uncalled for and unpaid.

And that said trustees were not requested to take possession of said trust estate, under said deed, until on or about the 3rd day of November, 1866, and that in the meantime nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors, and that the amount of the same was wholly insufficient to pay the debts of said company.

And that said company had hypothecated or otherwise used and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and that the actual amount of money realized and received by said trustees under said assignment
43 was not sufficient to pay the debts due the preferred creditors of the first class mentioned in said deed of trust.

And that of the amount of the said assessments upon the subscribers of twenty per cent. a large part cannot be collected at all by reason of the insolvency of the subscribers, and that a large part of said assessments has been lost by lapse of time and cannot now be collected.

And that as to the debts due upon said unpaid assessments said trustees have been hindered and delayed in the collection of the same by adverse litigation in the State of Maryland and in the State of New York and in other States, and that the right of said trustees to receive and collect the debts due the company by subscribers on said assessments has been called in question in some of the suits and validity of said deed of trust has been disputed.

And that in some of said suits said trustees have been enjoined from proceeding to collect the debts due said company, and said trustees have thus far been able to collect very little of said debts by reason of the difficulties interposed by said litigation.

And that the debts due said company and which ought to be applied in payment of its creditors are either now lost in a great part or are in danger of being lost, and are not now available for the payment of said creditors.

And that, even if said trustees can surmount the embarrassments and difficulties which have prevented them hitherto from realizing said assets, the amount which can be realized from all the property which passed to such trustees and which could, under any circumstances, be realized by them, would be entirely inadequate to pay the just debts of said company.

For that, as said defendants are advised by the true construction of said deed of trust, no part of the eighty per cent. of subscriptions to said capital stock which had not been called for by said company from its subscribers passed to said trustees, nor any power to sue for or to collect said subscriptions so uncalled for, but that the relations between said company and its subscribers and their legal rights and obligations as to said uncalled-for part of said subscription remained unaffected by said deed of trust.

And said defendants are advised that under said deed of trust said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber; and said defendants are advised that said company could not sue one of its subscribers for his subscription unless and until said company has first made an assessment or call upon such subscriber therefor; and said defendants are advised that, allowing said deed to have full legal validity elsewhere and allowing said trustees to proceed without impediment to collect all the debts
44 due the company collectible by them, the provisions of said

deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors are in very needy circumstances and nearly all of whom have waited nearly fourteen years for the satisfaction of their just demands.

And said defendants are advised that if said company were now to levy an additional assessment upon its stockholders it is doubtful whether the right to sue for and collect such assessments would vest in said trustees under said deed; and in attempting to collect the same said trustees would meet with this additional embarrassment, besides those which have attended their efforts to collect the calls already made and unpaid at the date of said deed, and which were intended to be conveyed to them by said deed.

And said defendants are advised that if it be held that any new call to be made by said company would not pass to said trustees and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call from its solvent stockholders, and much thereof would be lost in the expenses of litigation, and an equitable and just division thereof among the creditors would be wholly defeated, as said defendants are advised that a large part of the debts of said company are [is] too small to justify the holders of them, who are poor men, in entering upon such a race of diligence.

And said defendants are advised that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company, and that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And that inasmuch as the stockholders reside within different jurisdictions it is impossible for the creditors to make them all defendants in any one court and compel an equitable contribution from them to raise a fund sufficient to pay the debts of said company.

And that to proceed against the stockholders who are within the jurisdiction of each court would increase litigation and would lead to other injurious consequences; for said defendants are advised that should the creditors proceed against the stockholders within the jurisdiction of any one court they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute to resort to stock-
45 holders elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And the said defendants are advised that in view of the difficulties and embarrassments which have attended the efforts of said trustees to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view

of the further and additional difficulties that would attend any attempt on the part of said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss, and injustice that would attend an attempt on the part of said company to collect such new calls as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders direct in the different States and jurisdictions in which said stockholders reside, and in view of the unquestionable right of said creditors in some form to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

And said defendants are advised that said creditors are entitled to have an account taken of the debts of said company and of the assets now available for the payment of the same, other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled-for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the amount so required a proper allowance should be made for probable losses by reason of insolvency of stockholders and otherwise and for the expenses of collecting the same and for the expenses of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons to be appointed by this court, with adequate authority and power to sue for, collect, and receive the same and bring the same into this court to await its further order.

And said defendants admit that before the questions relating to the powers, rights, and obligations of said trustees under said deed of trust can be finally decided there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And that the creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder and the rights of the creditors ascertained and defined.

46 And said defendants are advised that, as said company is a Virginia corporation and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this State will be respected and enforced in the courts of other States when said deed may be drawn in question.

And, so said defendants are advised, that the creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And said defendants admit that there has not been recently any election of officers by said company, but said defendants are advised

that under its charter and the laws of Virginia the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the powers of such officers.

And said defendants are further advised that under the laws of Virginia the corporate franchises of said company and its existence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And said defendants admit that William H. Perot, of Baltimore, is the president of said company, —— ——, of ——, is the vice-president thereof, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Joseph R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Marbury, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, of Lynchburg, Virginia, or that such of said persons as are now living constitute said board of directors.

Further answering (the defendant Hoge herein answering upon information and belief only), these defendants allege and show to the court that said The National Express and Transportation Company continued to carry on its regular and usual express and transportation business for some time after the execution and delivery to said trustees of said deed of trust of September 20th, 1866; that the defendant Kelly was theretofore and in the year 1866 the vice-president of said The National Express and Transportation Company, and that in or about the month of August, 1866, the defendant Kelly was appointed to be the general superintendent of said company, thereafter having and exercising general charge of and supervision over the affairs and business of said company; that as such officer of the company and in one or the other of said capacities the defendant Kelly had, during the time the company was carrying on a general transportation business, frequent and free access to and use of the books of the company kept, whether at the principal office of the company or at its branch offices, and in fact frequently saw and consulted many or all of said books; that until in or about the month of
47 November, 1866, the said books were in the charge and custody of the several officers or employees of the company whose duty it was to keep and write up such books, respectively; that in or about the month of ——, 1866, such of said books as show the liabilities and assets of the company, the list of subscribers to the capital of the company, the shareholders of the company, the minutes of the proceedings of meetings of shareholders or directors of the company, the assessments levied upon the subscribers or shareholders, the amounts of such assessments paid in and who made such payments, and generally the books and papers needed by any one who would attempt to enforce against subscribers or shareholders the liabilities of the company, passed into the charge and custody of the late Thomas G. Pratt, of Baltimore city, Maryland, who had been theretofore appointed, by decree of a Maryland court, to be receiver of the assets, &c., of said company; that said books, as these defendants are informed and believe, remained in the

charge and custody of said receiver until in or about the month of ——, in the year 1867, when said decree of the Maryland court was revoked and vacated and said books were surrendered and delivered to the defendant Kelly, in whose charge and custody they have ever since remained and been in the city of New York, *New York;* that said defendant Kelly has never heretofore afforded or authorized the use of or any access to said books or papers or any of them to any creditor of the company or to any other person whatever except the attorney and counsel of said trustees and the attorney and counsel of the said company in the city of New York, who was, as these defendants are informed and believe, heretofore duly elected and retained by the company in and about the various litigations in which the company has, since the autumn of the year 1866, been a party in New York, and who has remained to this day the attorney and counsel for the company and in charge of such litigations in the company's behalf in New York, and that, as far as these defendants know or are informed, no creditor of the company has in fact consulted, had access to, or seen the said books or papers or any of them since they came into the custody of the defendant Kelly as aforesaid.

Further answering, these defendants show to the court that many and various proceedings, chiefly in the courts of Maryland or in the courts of New York, have (in which States a large part, if not the larger part, of the outstanding shares of said company are held) since the 20th day of September, 1866, been conducted by the company and by the said trustees at a large expense for counsel and otherwise, in the effort to establish the rights of the company and of the trustees against persons indebted to the company, but that in New York there is an injunction yet in effect, issued by the supreme court of that
48 State, enjoining both the company itself and the said trustees from collecting any debts whatever due to the company in that State, the action in which said injunction was granted having been brought by one of the shareholders in his own behalf and in behalf of all others, and the same being now still pending, whilst the trustees are without funds to defray the further expenses of counsel and otherwise, which will be necessarily incurred in and by further proceedings in that suit, in which the officers of the company have heretofore and for several years held aloof and afforded the trustees no assistance whatever; and that the situation in Maryland and in other States is, as these defendants are informed and believe, very similar to that in New York, no practical success having as yet been had in efforts to collect the amounts due the company or the trustees by debtors residing there, the officers of the company doing nothing for the benefit of the creditors of the company and the trustees themselves being without funds to continue in active performance of their trust, in the teeth of the determined and alert opposition of the company's shareholders everywhere to and any and every attempt heretofore made to compel them to meet and liquidate their liabilities.

Further answering, the said defendants, John Blair Hoge and John

J. Kelly, the surviving trustees as aforesaid, say that they have and each of them, separately for himself, says that he has no money belonging to said company or to any creditor of said company now in possession or under control, and that they have no other property of said company in possession or under control, except that the defendant Kelly has, as aforesaid, custody and charge of certain books and papers of the company hereinbefore mentioned or referred to, and that any account which may now be rendered or stated by these defendants would show these defendants are themselves out of pocket in the effort to perform the said trust, each of these defendants having necessarily expended in the said efforts to perform his duties as such trustee an amount of money considerably in excess of any and all the inconsiderable moneys he has been able to collect under said deed of trust, the great body of the debts of the company remaining meantime unpaid.

And these defendants submit to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and disposed of at law, &c., &c.

And these defendants deny all unlawful combinations and confederacy in the said bill charged, without that, &c., &c.

STATE OF VIRGINIA:

John J. Kelly, being duly sworn, says that he is the defend-
49 ant of that name in the action above entitled, and is one of the trustees named in said deed of trust; that he has read the foregoing separate answer made by him and by the defendant, John Blair Hoge, as surviving trustees, to the complainant's bill, and that he knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this 26th day of April, 1880.

O. G. KEAN, *N. P.*

The answer of John Blair Hoge, referred to in foregoing decree as filed Dec'r 14th, 1880, is in the words and figures following, to wit:

Answer of J. B. Hoge.

The answer of John Blair Hoge, trustee, to an original and an amended and supplemental bill filed against him and others by W. W. Glenn, &c., suing, &c., against the National Express and Transportation Company and others in the chancery court of the city of Richmond.

This respondent, saving, &c., for answer says that he adopts in the main the answer of his codefendant and trustee, John J. Kelly; that he is now a judge of one of the circuit courts of the State of West Virginia, and is so situated that he could not give active and personal attention to the business involved in this litigation and is

willing to resign his trust and does hereby resign it, if deemed necessary and proper by the court; but that he is willing, nevertheless, if the continuance of his trusteeship should be considered advantageous to the ends of justice in attaining the objects of the suit, to allow his name to be used as such trustee and to perform such active duties of his trust as may not be incompatible with his judicial duties as one of the judges of the circuit court of West Virginia.

And now, having fully answered, &c., this respondent prays to be hence dismissed, &c.

JOHN BLAIR HOGE.

Affidavit to the foregoing answer is hereby waived.

JOHN HOWARD, *P. Q.*

July 5th, 1880.

50 The amended and supplemental answer of John J. Kelley referred to in foregoing decree is in the words and figures following, to wit:

A. & Sup'l Answer of John J. Kelly.

The amended and supplemental answer of John J. Kelly to an original and amended and supplemental bill filed against him and others in the chancery court of the city of Richmond by W. W. Glenn and his administrator, suing for the creditors of the National Express and Transportation Company.

This respondent, for further answer to the said bill, says that he is willing to resign and renounce and does hereby resign and renounce his office as one of the trustees in the deed in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, C. Oliver O'Donnell, and himself, in trust for the benefit of his creditors; but respondent prays that when funds shall come under the control of the court in this cause he may be reimbursed for the sums expended by him and for his services in the performance of his duty as trustee.

And now, having fully answered the said bills, he prays hence to be dismissed.

JOHN J. KELLY.

The within answer may be received without affidavit.

JOHN HOWARD, *P. Q.*

Nov. 30th, 1880.

The amended and supplemental report of Com'r Otho G. Kean, referred to in foregoing decree and dated December 8th, 1880, and the exhibits therewith, are in the words and figures following, to wit:

Amend'd & Supple. Report.

COMM'R'S OFFICE, No. 1113 MAIN STREET,
RICHMOND, *Dec'r 8th*, 1880.

GLENN'S ADM'R
v.
NATIONAL EXPRESS & TRANSPORTATION COMPANY.

To the Hon. Ed. H. Fitzhugh, judge of the chancery court for the city of Richmond:

By request of John Howard, Esq., of counsel for W. W.
51 Glenn's adm'r, and, as I am informed, with the approval of the court, I now submit the following as a supplement to my report filed in this cause June 19th, 1880:

I. Herewith returned are four papers marked, respectively, "A," "B," "C," and "D." They are extracts taken from the record book of the board of directors of the defendant company. I have carefully compared them with the originals in said book and find and hereby certify them to be true copies.

II. In my former report, filed June 19th, 1880, a statement was rendered showing an assignment of 20 per cent. on the par value of unpaid stock, being 80 per cent. of the par value of the original stock, was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars. First, the assessment, whatever it be, should be laid on the par of the stock and not on that amount, less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the basis of the assessment. Secondly, on reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary power of the court. The reasons seem sufficiently obvious. The stockholders, by whom the enormous debt of the defendant company is due, are very numerous; as shown by evidence in the cause, they are widely dispersed; many are, doubtless, insolvent, many dead, and consequently the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessments should provide for these costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liability would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interests of debtor as well as creditor, that an assessment should be laid at the start on which enough may — realized to satisfy the debts of the company; and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy as well as less expensive to return the overplus to the stockholders than it would be (in the event of deficiency) to collect a second one.

The following statement is based on the foregoing views:

Par value of 40,044 shares at one hundred doll's per share ---------- $4,004,400 00
On which an assessment of 30 per cent. would give (for payment of the company's debts and the costs and expenses of collection) ---------- 1,201,320 00

52 This sum greatly exceeds, it is true, the amount of debt, which, with probable costs, is about $650,000.00, but I fix the assessment at 30 per cent., because I think it safe to assume that not more than 50 per cent. of any assessment will be realized.

Respectfully submitted,

OTHO. G. KEAN, *Comm'r.*

Fee, $10.

EXHIBIT "A," with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Extract from proceedings of the board of directors of the National Express and Transportation Company, at a call meeting held Nov'r 1st, 1866.

(Page 149:)

The resignation of Mr. Echols was offered and accepted.

Mr. Joseph R. Anderson, of Richmond, was unanimously elected a director, vice Echols resigned, and took his seat.

* * * * * * *

(Page 151:)

Resolution Offered.

By Mr. Anderson:

Resolved, That the president, or, in his absence, the vice-president, be instructed to apply to the General Assembly of Virginia, if practicable, on the first day of the ensuing session to make such amendments of the charter as were indicated by the stockholders at their recent meeting, and, in addition thereto, an amendment authorizing the company to buy in the stock of delinquent stockholders, if, upon legal advice, there be no objection thereto.

Adopted unanimously.

M. G. HARMAN,
Vice-President.

J. V. H. ALLEN, *Secretary.*

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I do hereby certify that the above is an extract from the
53 record of the board of directors of the National Express, and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "B," with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Extract from by-laws and regulations of the National Express and Transportation Company, adopted by the board of directors Dec. 6th, 1866.

8th by-law, page 47 of record:

"A majority of the directors shall be necessary to form a quorum for the transaction of business, but a less number than five directors may adjourn from time to time until a majority be present.

Vacancies in the board, caused by death, resignation, or disqualification, shall be filled by a majority of the votes of all the remaining directors."

J. E. JOHNSON, *President.*

P. T. MOORE, *Secretary.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "C," with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Adjourned meeting.

BALTIMORE, *Sept. 18th,* 1866.

54 Present: J. E. Johnston, president, Austin Dall, H. G. Fant, D. J. Foley, Wm. Devries.

By Mr. ——:

Resolved, That the president of this company be, and is hereby, directed to execute and acknowledge for record a deed conveying all the property of this company of every species whatsoever to John Blair Hoge and John J. Kelly in trust to secure its creditors, upon such terms as he may deem equitable, substantially in accordance with the draft of the deed submitted to this meeting of the board, and with special regard to the pledges of the company already made to the Bank of Commerce of Baltimore and to the Baltimore and Ohio Railroad Company.

The said deed will be delivered to the trustees named therein and recorded as soon as practicable.

Adopted unanimously.

On motion, meeting adjourned.

J. V. H. ALLEN, *Secretary.*

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said abstract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "D," with Comm'r Kean's Supp'l Report, Dated Dec'r 8, 1880.

Copy of resolutions of board of directors of the National Express and Transportation Company passed at an adjourned meeting held Aug. 9th, 1866.

Ordered, That there be appropriated and set apart one-half of the first receipts from assessments on stock, old and new, to be paid
55 over ratably to the Baltimore and Ohio Railroad Company and to the Bank of Commerce, in proportion to their respective claims against the company; and if in this way said debts be not paid within fifty (50) days, or at any time sooner, if required by said railroad company or bank, the president of this company is directed to execute and deliver any assurance, mortgage, assignment, or conveyance which the counsel of said bank and railroad company or the counsel of either of them may advise for the more perfect security of said railroad company and bank, and to save them harmless in any contingency; and the treasurer of this company is hereby directed to regard such receipts as specifically appropriated to these purposes and to pay over the same as stated without further order, said assurance, mortgage, assignment, or conveyance to cover any property, effects, or claims of this company that may be designated by said R. R. Co. and bank or either of them. No other lien on the property, effects, or claims of this company shall be given or allowed so as to interfere with the honorable obligations involved in this proposition.

That the president of this board cause to be delivered to said R. R. Co. and bank, each, a duly stamped copy of the foregoing order as an engagement and agreement of this company, in consideration of forbearance to fulfil the above stipulations in regard to the security of their debts.

Adopted unanimously.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

The following paper was filed in this cause on the 14th day of December, 1880, and the same is as follows:

Act of Incorporation and Amendment.

An act to amend and re-enact an act to incorporate the
56 Southern Express Company, passed March 22d, 1861, and to incorporate the National Express and Transportation Company.

Passed December 12, 1865.

Be it enacted by the General Assembly of the State of Virginia, That the act passed March twenty-second, eighteen hundred and sixty-one, entitled An act to incorporate the Southern Express Company, be amended and re-enacted so as to read as follows:

"1. Be it enacted by the General Assembly of Virginia, That Joseph E. Johnston, William L. Montague, William J. Hawkins, M. G. Harman, Francis Skiddy, Charles W. Purcell, L. W. Glazebrook, John Echols, and Benjamin Hart and their associates, successors, and assigns be, and they are hereby, declared made a body corporate and politic by the name of the National Express and Transportation Company, for the purpose of an express and transportation business, and as such shall have perpetual succession and a common seal, which it may alter or renew at pleasure; and may sue and be sued, implead and be impleaded, contract and be contracted with, purchase, hold, and grant such estates, real and personal, as may be necessary for the carrying on of the legitimate business of said company; and make ordinances, by-laws, and regulations for the government of all under its authority and the proper conduct of its affairs.

"2. The capital stock of said company shall be five millions of dollars, and shall be divided into shares of one hundred dollars each; but the said capital stock may, from time to time, by order of the board of directors, be increased to a sum not exceeding ten millions of dollars.

"3. The said company may commence business as soon as one-third of its capital stock is subscribed and one hundred thousand dollars of same is paid up; and, on such subscriptions being made, any five of the stockholders may call a general meeting of the stockholders of the said company by advertising the time and place of such meeting, at least twenty days before the time of holding the same, in three of the daily newspapers of Richmond: Provided, however, That any other mode or time of calling such meeting shall be lawful if two-thirds of the stockholders are represented thereat. At the meeting convened as aforesaid the said company shall elect, by a majority of the votes then present or represented, not less than five nor more than nine persons, being stockholders of the said com-

pany, to act as directors, who shall represent the said company and manage the business thereof.

"4. The board of directors shall, at their first meeting after their election, elect one of their number as president of the said corporation, and may elect such other officers as they may deem
57 advisable. The president and directors of this corporation shall hold their offices for one year and until their successors are chosen. Vacancies in the board of directors shall be filled in such manner as the by-laws of the corporation may prescribe.

"5. The annual election of directors and other officers of this corporation shall be held at such place and in such manner as its by-laws may prescribe.

"6. The said company shall have power to do an express and general transportation business, by land or by water, for the conveyance of persons and property of every kind throughout or beyond the limits of Virginia, in their own conveyances or in those of such other persons or corporations as they may contract with; and to create and organize branch agencies for the same purpose; and to form any such arrangement, purchase, or union with any other express or transportation company as may, in their opinion, be advantageous; and to build, hire, establish, and maintain storehouses and other buildings for the safe keeping of the property entrusted to their care for transportation; and shall have power to indemnify themselves by insurance against any loss or damage by fire or the risks of navigation or transportation on any property held either in their own right or as bailees.

"7. The said company shall have power to sell all freights or baggage if the same remain unclaimed more than one year in its possession; but such sale shall be at public auction and after notice for not less than four weeks in one or more newspapers published at or nearest the place of sale, and if such freights or baggage are of a perishable nature it may be sold as soon as necessary. Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time of its deposit with the company, together with the name and residence of the owner or consignee of the same, if known. The proceeds of such sale shall be applied to the satisfaction of all charges upon the said unclaimed freight or baggage arising from its storage, transportation, and sale. The residue, if any there be, shall be held in trust for the owner; and it shall be the duty of the said company to keep, at its principal office, a faithful record of all proceedings had under this power of sale; which record shall be open to the inspection of all claimants.

"8. The principal office shall be kept at Richmond, Virginia, unless the same be changed to some other place by a vote of two-thirds of the directors; and the said company may establish as many local offices as the president or board of directors may deem necessary.

"9. The right to the franchise granted by this act shall rest as soon as one-third of the capital stock is subscribed and one hundred thousand dollars of the same shall be paid up. Of these facts it shall be the duty of the company to inform the Governor,

58 as the officers of banks about to be put into operation are required to do.

"10. This act shall be in force from its passage and shall be subject to modification or repeal at the pleasure of the General Assembly."

OFFICE OF KEEPER OF ROLLS OF VA.

I hereby certify that the foregoing act of Assembly is a true copy from the rolls in my office this 30th day of November, 1880.

P. H. McCAULL,
Clerk House of Delegates and Keeper of the Rolls of Virginia.

An act to amend the 8th section of an act entitled An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company, passed December 12, 1865.

Passed December 18, 1865.

1. Be it enacted by the General Assembly of Virginia, That the eighth section of the act passed December twelfth, eighteen hundred and sixty-five, entitled An act to amend and re-enact an act to incorporate the Southern Express Company, passed March twenty-second, eighteen hundred and sixty-one, and to incorporate the National Express and Transportation Company, be amended and re-enacted so as to read as follows:

§ 8. The principal office shall be kept at Richmond, in Virginia, unless the same be removed to some other place within this Commonwealth by order of the stockholders in general meeting, and the said company may establish as many local offices as the president or board of directors may deem necessary.

2. This act shall be in force from its passage.

OFFICE OF KEEPER OF ROLLS OF VA.

I hereby certify that the foregoing act of Assembly is a true copy from the rolls in my office this 30th day of November, 1880.

P. H. McCAULL,
Clerk House of Delegates and Keeper of the Rolls of Virginia.

The following is the opinion of court referred to in the foregoing decree of December 14th, 1880:

59 *Opinion of Court.*

GLENN'S ADM'R
v.
THE NATIONAL EXPRESS AND TRANS. CO., &c.

This suit was instituted in 1871, but nothing seems to have been done in it until the spring term of this court of 1879, when leave was asked and obtained to file an amended and supplemental bill. This inaction was caused, it is alleged, by reason of litigation pending in other States; but after the filing of the amended and supplemental bill, in August, 1879, the cause has been actively prose-

cuted by the plaintiff. As soon as it matured for hearing it was referred to one of the master commissioners of the court to ascertain and report to the court an account of the debts and liabilities of the company, and also a statement of its assets.

Due notice of the enquiries ordered to be made by the master commissioner was given by publication in a newspaper then published in the city of Richmond.

The master commissioner, after examining the books of the company and other documentary evidence and taking the depositions of numerous witnesses, has made his report, showing an aggregate indebtedness of the company on the 1st day of June, 1880, of $509,392.41.

There is no exception to this report. It appears to be correct in all respects in regard to the indebtedness of the company, and must therefore be approved and confirmed as to said indebtedness.

Regarding the indebtedness of the company as above indicated to be established, the question arises, How is it to be paid?

By a deed dated on the 20th day of September, 1866, the company conveyed all of its estate and property of every description to trustees to secure the payment of its debts, and the answer to the question just mentioned depends largely upon the validity, construction, and enforcement of that deed.

I. The court is clearly of opinion that the said deed is valid.

This corporation was chartered by the Legislature of Virginia, and had its principal office in the city of Richmond, the capital of the State; and though by the 8th section of act of incorporation power was given to two-thirds of the directors to change the locality of the principal office without restriction as to State boundaries, yet by an amendment to the charter passed December 18th, 1865, this was limited to removal to "some other place within this Commonwealth," and power was given to establish local offices anywhere.

This company, therefore, is a Virginia corporation, and, as well by positive statute as by an inherent legal incident of its existence, it is domiciled in Virginia, though it may and was designed
60 to do business elsewhere as well. Bank of Augusta *v.* Earle, 13 Peters, 519; Paul *v.* Virginia, 8 Wall., 186.

The deed in question was executed, acknowledged, delivered, and recorded in the city of Richmond, Virginia, as is shown by the certificate, in Richmond, of the notary public, Roger J. Page, bearing even date with the deed, and by the certificate of Robert Howard, clerk of the hustings court of Richmond, of the recordation of the deed on the day following; and, as will be seen, it was executed by the president of the company by virtue and in pursuance of a resolution of the board of directors, in whom the whole management of the affairs of the company was vested, conferring upon him full authority and power for that purpose. It is therefore the deed of a Virginia corporation, under its corporate seal, and by proper authority duly made and delivered in Virginia, and its validity and effect should be determined by the laws of this State.

It purports to convey all of the property of the company in trust for the benefit of all its creditors, and this it was perfectly lawful

and proper to do. It gives preferences to some creditors over others; but no law is better established in Virginia than that such preferences are legal; and this will be of no practical importance if the assets of the company be sufficient to pay its debts.

It retains for a limited time possession in the company of the property conveyed; but that this may be done is equally well-established law in Virginia.

After repeated decisions of the supreme court of appeals of this State, establishing the validity of such deeds, the court entertains no doubt as to the legality and binding effect of this deed in all respects. The decision of the supreme court of Maryland, based upon some of these Virginia decisions, and the testimony of many of the prominent counsel of the bar of this court given as experts as to the law of Virginia in respect to this deed, and establishing the validity of the deed, was, in the judgment of this court, plainly and clearly correct. See Balto. & Ohio R. R. Co. *v.* Glenn, 28 Maryland R., 287.

II. The validity of the deed being established, the next question is, What was its legal effect? What were the terms of the conveyance and what did it convey?

It is evident from the report of the commissioner and from the face of the deed that the company was greatly embarrassed financially, and that its general and leading object in executing the deed was to dedicate all of its assets and effects of every kind to the payment of its debts. Accordingly, to accomplish this purpose, it says, "The party of the first part doth hereby grant, bargain, sell, convey, assign, and set over unto the said parties of the second part (the trustees) all the estate, property, rights, and credits of the
61 said party of the first part of every kind, wheresoever situated, in or out of the State of Virginia."

It is difficult to conceive of larger and more comprehensive words of description of the property and rights and credits thus conveyed and assigned. But the deed does not stop there; it proceeds to make a general enumeration of the things and rights conveyed and assigned, thus, "including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects, and moneys payable to the company, whether on calls or assessments on the stock of the company or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A and annexed hereto as soon as can be conveniently done, but the omission of any property from such schedule is not to prevent the same from being hereby granted or assigned."

Here is an express enumeration of "moneys payable to the company, whether on calls or assessments of stock of the company or on notes, bills, accounts, or otherwise," and though no schedule was ever made or annexed to the deed, yet the distinct reference to such a schedule as is described, with the statement that the "omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned," is ample proof that it was the object, intent, and meaning of the company to convey all of its estate, rights, and credits of every kind in trust for the payment of its debts; and in the deed it made and exe-

cuted it used language which has been held by the courts to be apt and sufficient to pass everything the company owned or to which it was entitled, inclusive of the estate, property, rights, and credits of the company of every kind and wherever situated. See Maitland *v.* Newton, 3 Leigh, 714, citing Comegy's *v.* Vasse, 1 Peters, 193; Mundy *v.* Vawter, 3 Grat., 518; Griffin *v.* Macauley, 7 Grat., 477; Wickham *v.* Lewis, Martin & Co., 13 Grat., 427, 437, 438; Milner *v.* Met., 16 Peters, 221.

And the same principle seems to have prevailed in the bankrupt court, where the register assigns and conveys all the estate, real and personal, of the bankrupt. The decisions in such cases appear to be uniform that the right to receive unpaid subscriptions to the capital stock of a bankrupt corporation passes by the act of Congress and the register's deed to the assignee in bankruptcy. Indeed no question seems to have been made upon the subject, and the cases seem to have proceeded upon the assumption that such right was vested in the assignee. See Sanger *v.* Upton, assignee, 91 U. S. R., 56; Upton, assignee, *v.* Tribilcock, *idem.*, p. 45; Turnbull *v.* Payson, 95 U. S. R., 418; Pullman *v.* Upton, 96 U. S. R., 328.

By chapter 57, section 3, p. 546, of the Code of Virginia of 1873 (which is a reprint in this respect of the like chapter in the Code of 1860), it is provided that "upon every subscription for
62 shares in any joint stock company (other than a bank of circulation) there shall be paid upon each share two dollars at the time of subscribing and the residue thereof as required by the president and directors. A subscription to such stock obviously creates a debt or obligation, of which two dollars a share are payable *in presenti* and the residue *in futuro*. This residue is an express credit extended by the company to the stockholders, and the company has a plain legal statutory right to demand payment whenever it may be needed, or, as the statute declares, "as (when) required by the president and directors;" and it is further provided by the statute, see chapter 57, section 23, p. 550, Code of 1873 (same chapter, section 21, p. 334, Code of 1860), that if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors the same, with interest thereon, may be recovered by warrant or action, according to the amount, or by motion in lieu of an action; so that the statute not only recognizes such a subscription as a debt to the company—an express credit intended by the company to the stockholders—but it provides the remedy for its recovery by legal proceedings; and, independently of the statute, it seems that on general principles such subscriptions are recognized by the courts as debts due to the company, which the company has the right to recover of the stockholders and which are to be regarded as a fund which the corporation holds for the payment of its debts. See Marsh, &c., *v.* Burroughs, Wood's Cir. C't R., pp. 468, 479; Hatch *v.* Dana, 101 U. S. R., pp. 210, 211.

The court is clearly of the opinion that the broad and comprehensive terms of the deed embraced the unpaid subscriptions of stock, and that it conveyed and transferred to the trustees for the purposes of the trust the right to receive when called for all such unpaid sub-

scriptions, and that the deed carried all the credits belonging to the company in that respect; and the court is further of opinion that, inasmuch as the president and directors have failed and omitted to make those rights and credits of the company available to its creditors by making a call and assessment upon the stockholders, it is the duty of the court under the law to effectuate those rights and collect and appropriate those credits in such manner and by such means as may be necessary and proper for the execution of the trusts of the said deed.

III. Having decided that the deed is valid and that it embraced all the property, rights, and credits of the company, it remains to be considered how the rights of the creditors are to be enforced.

It seems from the proceedings in this case that the great bulk of the property, effects, and claims of the company consists of unpaid subscriptions to its capital stock; and the creditors must look entirely to this fund for the payment of their debts.

As to 80 per cent. of the stock, the subscription is wholly
63 unpaid; and the president and board of directors have made no call or assessment on the stockholders and no order whatever in regard to the collection of any part of this unpaid subscription, and for many years they seem to have entirely abandoned the business of the company. It is charged that neither the directors nor the stockholders of the company have had a meeting for nearly fourteen years, but, although the company has ceased to do business and the president and directors no longer give attention to its affairs, the corporation has not become extinct. Under the statute of Virginia, chapter 56, section 31, p. 543, of the Code of 1873, "such corporations may sue and be sued, as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto;" and by sect. 4 of the charter of this company (acts 1865–'6, p. 380) it is expressly provided that the president and directors of this corporation shall hold their offices for one year, and until their successors are chosen; and see also, to same effect, chapter 57, section 14, Code of 1873, p. 549, where the president and directors of the company and the stockholders of the company are in default in making provision for the payment of its debts; it is made the duty of the court to enforce payment of the stock subscriptions to an extent sufficient, with any other assets that may be in the hands of the trustees, to pay the debts of the company, the costs of suit, and the expenses incident to the execution of the trusts; for it seems to be well settled that a court of equity may enforce payment of stock subscriptions, though there may have been no calls for them by the company. Hatch *v.* Dana, 101 U. S. R. (11 Otto), 214, 215; Thompson *v.* Stockholders, sects. 15 and 345.

It is to be regretted that the parties themselves have not attended to this duty. They could have acted with a knowledge of all the facts, and were in a better position and circumstances to know what was requisite and proper than a court can be. It is very clear that a call and assessment must be made on the stockholders, but it is difficult to determine what it should be.

With the lights now before the court, it is deemed most advisable, under all the circumstances, to accept the recommendations of the commissioner in his supplemental report of December 8, 1880, which is as follows: "In my former report, filed June 19th, 1880, a statement was rendered showing that an assessment of 20 per cent. on the par value of unpaid stock, being 80 per cent. of the par value of the original stock, was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars. First, the assessment, whatever it be, should be laid on the par of the stock and not on that amount, less assessments heretofore made. In other words, the par or face
64 value of the company's stock should furnish the basis of the assessment. Secondly, on reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary powers of the court.

The reasons seem sufficiently obvious. The stockholders, by whom the enormous debt of the defendant company is due, are very numerous, as shown by evidence in the cause; they are widely dispersed; many are doubtless insolvent, many dead, and consequently the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessment should provide for those costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interest of debtor as well as creditor, that an assessment should be laid at the start on which enough may be realized to satisfy the debts of the company, and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy as well as less expensive to return the overplus to the stockholders than it would be (in the event of a deficiency) to collect a second one."

IV. By the answer of John Blair Hoge and the amended and supplemental answer of John J. Kelley, surviving trustees in the said deed of trust, it appears that they are so situated personally as to be unable to execute the trusts, and they desire to be relieved from the office of trustee. It would be a source of satisfaction to the court if they would continue to act; but inasmuch as they decline to do so, they should by proper order be removed from their said office.

It is represented to the court by the counsel for the creditors whose debts have been established that John Glenn, Esquire, of Baltimore, Maryland, is a fit and proper person to be substituted and appointed as trustee to execute the trusts of said deed, and a proper order appointing him as substituted trustee will be entered, but before he undertakes to act in the execution of the trust he will be required to give bond, with good security, before the clerk of this court, in the penalty of $100,000, conditioned for the faithful discharge of his duties as such substituted trustee.

He will be required from time to time to report his proceedings to the court in the execution of the trust, so that the whole trust shall be executed under the supervision of the court. He will deposit his collections, after paying the necessary costs and expenses incident to the administration of the trust, in the Planters' National Bank of Richmond, to the credit of the court in this cause, or in such other bank as may from time to time be designated by the court.

And the said substituted trustee shall from time to time, not omitting any period of six months, render an account of his transactions before one of the master commissioners of this court; and such commissioner will be directed, upon such settlement being made, to report the same to the court; and, upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

And at another day, to wit, at a chancery court of the city of Richmond, continued by adjournment and held for said city on the 3rd day of January, 1881.

JOHN W. WRIGHT, Sheriff of the City of Richmond and as such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Pl't'ffs,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, Wm. Devries, D. J. Foley, J. R. Anderson, F. P. Zimmerman, J. Carter Marbury, Wm. H. Webb, Lorenzo Norvell, M. B. Poitiaux, John Blair Hoge, and John J. Kelly, Trustees, Def'ts.

This day came John Glenn, by John Howard, his counsel, and represented to the court that he had duly executed the bond before the clerk of this court, required of him as substituted trustee in the deed of trust in the proceedings mentioned by the decree entered herein on the 14th day of December, 1880, and exhibited to the court the said bond, bearing date the 31st day of December, 1880, with John M. Glenn, John C. Backus, Henrietta R. Glenn, Edward G. Kenly as sureties thereon, executing the same by said John Howard, their attorney-in-fact, and the powers of attorney from the said sureties authorizing the execution of the said bond in their stead by their said attorney-in-fact, accompanied with affidavits of the several sureties of the sufficiency of such security, and the recommendation in writing of Charles Marshall and John Howard, attorneys and counsel for the creditors of the defendant company, whose claims were established by the said decree of the 14th December, 1880, that the said sureties be accepted; and the court, being satisfied of the due execution of the said bond in all respects and of the sufficiency of the said sureties, doth hereby approve the said bond and the action of the clerk of this court in taking and accepting the same.

66 And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for said city, on the 11th day of January, 1881.

JOHN W. WRIGHT, Sheriff and Adm'r, &c., P't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION CO. & *als.*, Def'ts.

On motion of the plaintiff, it is ordered that Master Commissioner O. G. Kean do, with all convenient speed, have certified copies made under his inspection of the stock book and ledger stock book of the said National Express and Transportation Company referred to in the report of the said commissioner of the 19th day of June, 1880, and deliver the same, together with the said books and all other books of the said company that may be in the office of the said commissioner, to John Glenn, substituted trustee in the deed of trust in the proceedings mentioned, or to his counsel.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for said city on the 30th day of April, 1881.

JOHN W. WRIGHT, Sheriff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

Upon consideration of the report of Commissioner O. G. Kean, filed on the 5th day of March, 1881, it is ordered that the sum of forty dollars be, and the same is hereby, allowed the said commissioner as his fee for the services rendered by him as indicated in said report, and that the sum of one hundred dollars be, and the same is hereby, allowed the said Wm. G. Allen for his services as copyist rendered by him as indicated in said report; the said several sums to be paid by the plaintiff, John W. Wright, administrator of W. W. Glenn, deceased, out of any funds in his hands to be administered, or by John Glenn, substituted trustee in the deed of trust in the proceedings mentioned, out of any trust funds in his hands to be administered; said several sums to be in full satisfaction for the said services respectively rendered as aforesaid and to be subject to proper credits for any part thereof, if any, heretofore received by either the said commissioner or the said Allen.

67 And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 13th day of October, 1881.

JOHN W. WRIGHT, Sheriff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

This day came James J. Trotter, by counsel, and tendered his petition in this cause and asks leave to file the same, and court, without refusing or granting leave to file said petition, takes time to consider said request.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 2d day of January, 1882.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION Co. and *als.*, Def'ts.

In the Matter of the Petition of J. J. A. Trotter.

It appearing to the court that notice of the motion made in this matter on the 15th December, 1881, has been duly served on Wise & Hobson and W. W. Gordon, the attorneys for said Trotter, it is ordered that said motion be docketed and continued until to-morrow morning at ten o'clock.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 14th day of May, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION Co. and *als.*, Def'ts.

This cause came on this day to be heard on the papers formerly read and the petition of J. J. A. Trotter and the petition of John E. Hurst and others, which said petitions are hereby ordered to be filed in this cause; and the court doth adjudge, order, and decree that John Glenn, who was appointed substituted trustee in the place of Kelly and Hoge, is hereby directed to take no further steps towards the collection of the thirty per cent. assessment against the stockholders of the defendant company until the 9th day of June, 1883, and that he shall suspend the prosecution
68 of any suits which he may have heretofore instituted under and by virtue of the decree of December 14th, 1880, in this cause until the said 9th day of June, 1883; and leave is given the complainant or any other party interested to answer the said petitions or either of them.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 9th of June, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION Co. and *als.*, Def'ts.

This cause came on again to be heard, formerly read, and was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the restraining order of May 14th, 1883, be continued until the 21st day of June, 1883.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 19th of June, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

This day the Baltimore and Ohio Railroad Company, the Bank of Commerce (of Baltimore); John W. Wright, sheriff of the city of Richmond and as such administrator of W. W. Glenn, deceased; Francis Murray, for the use of John R. Terry; Henry M. Bash, trustee for John O. Reid, Henry R. Robins, and Nicholas E. Watkins, Luke H. Miller; the Philadelphia, Wilmington and Baltimore Railroad Company, the Seaboard and Roanoke Railroad Company, the Richmond and Danville Railroad Company, the Orange and Alexandria Railroad Company, the Wilmington and Weldon Railroad Company, J. T. M. Barnes, and Richard J. Allison, by leave of the court, filed their joint and several answer to the petition of John E. Hurst and others filed herein on the 14th day of May, 1883; and the said respondents, by like leave of the court, also filed their joint and several answer to the petition of J. J. A. Trotter, also filed herein on the said 14th day of May, 1884.

69 And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 30th of June, 1884.

JOHN W. WRIGHT, Sh'ff & Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS and TRANSPORTATION COMPANY & *als.*, Def'ts.

This day, by leave of the court, the Baltimore and Ohio Railroad Company, the Bank of Commerce of Baltimore, John W. Wright, sheriff and as such administrator of W. W. Glenn, deceased, in behalf of themselves and all other creditors of the said company whose claims are established by the said decree of December 14th, 1880, filed their joint and several answer to the petition of Thomas L. Farish and others filed in this cause; to which answer said petitioners replied generally.

And at another day, to wit, at a court of chancery for the city of Richmond, continued by adjournment and held for the said city, the 21st July, 1883.

JOHN W. WRIGHT, Sh'ff & Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY & *als.*, Def'ts.

This cause came on this day to be heard again on the papers formerly read, the petition filed, the answers thereto, the replications to said answers, the exhibits filed, the depositions of witnesses, and was argued by counsel; on consideration whereof the court, without at present suspending the operation of the decree of December 14th,

1880, but expressly reserving for future consideration the question whether the stockholders are liable to any extent on their unpaid subscriptions for stock taken by them and the question whether the decree of December 14th, 1880, should be set aside and the bill dismissed, and without at this time deciding or considering any question in the cause raised by the petitions or answers thereto, but reserving all such questions for future consideration and determination by the court, doth, by consent of parties to this cause, as expressed by the endorsement of their counsel hereon, adjudge, order, and decree that John Glenn, trustee, on the payment to him, within six months from the date of this decree, by any of the subscribers to the stock of the defendant company or by any other person claimed to be liable on account of said stock, of twenty-five per centum of the original amount of said subscription, with interest thereon, at the rate of six per centum per annum, from thirty days from the date of this decree, with any costs incurred heretofore or by
70 said trustee in any suit brought by him heretofore or which may hereafter be brought before tender of said twenty-five per cent. under this decree, to recover of such stockholder or other party the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscription, both of the original subscribers thereto and of any assignee thereof.

And at another day, to wit, at a court of chancery for the city of Richmond, continued by adjournment and held for the said city, the 13th day of December, 1883.

JOHN W. WRIGHT, Sh'ff & Adm'r, Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

In order that all persons interested may have the opportunity to avail themselves of the compromise provided by the decree herein of July 21, 1883, if they elect so to do, it is ordered that John Glenn, trustee, do forthwith mail a copy of the said decree to every person against whom any liability is asserted in this suit; and the court further orders the said John Glenn, trustee, in every case where suit may hereafter be instituted before January 21, 1884, against any person, to serve a copy of said decree of July 21, 1883, upon such person before the institution of such suit, except in cases of attachment; and in cases of attachment the said copy shall be served as soon thereafter as practicable; and said trustee is directed to report to this court how he has executed this order.

And at another day, to wit, at a court of chancery for the city of Richmond, continued by adjournment and held for the said city, the 18th of December, 1883.

JOHN W. WRIGHT, Sh'ff & Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION Co. & *als.*, Def'ts.

This cause came on this day to be heard again, on the papers formerly read, the report of John Glenn, trustee, this day filed in respect to claim against the estate of Michael C. Garber, the affidavit mentioned in said petition, and was argued by counsel. On consideration whereof, the court being satisfied from said petition and exhibits that the compromise suggested by the said trustee
71 is judicious and is consented to by the creditors of said company, as evidenced by the endorsement of their counsel on this decree, doth adjudge, order, and decree that said trustee, John Glenn, be, and he is hereby, authorized to accept the sum of twelve hundred and fifty dollars in full of the liability of the estate of Michael C. Garber on account of the one hundred shares of stock in said petition mentioned, and to grant an acquittance and discharge of such liability, but such discharge is not to operate as an acquittance of Henry J. Rodgers, transferee of said stock, from liability in respect thereto.

And at another day, to wit, at a chancery court for the city on Richmond, continued by adjournment and held for the said city, on the 24th day of January, 1884.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION Co. and *als.*, Def'ts.

This day came George A. Smith and, by leave of court, filed his petition in this cause; whereupon, this cause coming on to be heard on the papers formerly read and on the said petition of George A. Smith and being argued by counsel, the court doth adjudge, order, and decree that this cause be referred to W. J. Leake, one of the commissioners of this court, to take proof of said George A. Smith, and said commissioner shall report the amount thereof, principal and interest, and whether the same is a preferred claim under the deed of trust referred to, these proceedings bearing date on the 20th day of September, 1866, together with any matter, specially stated, deemed pertinent by himself or required by any party interested to be so stated.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 9th of February, 1884.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION Co. and *als.*, Def'ts.

This day came Junius L. Brodie and, by leave of court, filed his petition in this cause; whereupon this cause came on to be further heard upon the papers formerly read and on the said petition of

Junius L. Brodie, with the exhibit filed therewith, and was
72 argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the decree entered in this cause on the 24th day of January, 1884, be amended and enlarged so as to require Commissioner W. J. Leake to enquire into the claim of the said petitioner, J. L. Brodie, and to report the character and amount of same, principal and interest, if found by him to be due and unsatisfied, and for them to enquire whether the same is a preferred claim under the deed of trust referred to in the proceedings in this cause, bearing date on the 20th day of September, 1866, and make report thereof to the court, with any matter specially stated deemed pertinent by himself or required by any party interested to be so stated.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, March 8th, 1884.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION CO. and *als.*, Def'ts.

The death of John W. Wright, late sheriff of the city of Richmond and as such administrator in Virginia of the estate of W. W. Glenn, deceased, is suggested, and, on motion of John Glenn, administrator of the said estate in Maryland, the same is committed to John Howard, Esq'r., who gave bond and qualified according to law as administrator *de bonis non* of said W. W. Glenn, dec'd; and thereupon, on motion of said Howard, this suit is revived as to the said estate in the name of said John Howard, as administrator *de bonis non* of said estate of W. W. Glenn; and thereupon this cause came on again to be heard on the papers formerly read, the report of the trustee, John Glenn, dated the 18th January, 1884, in reference to the liability of Thomas Opie, as a stockholder of the defendant company; the exhibits filed therewith, from an offer of compromise made by said Opie; the report of said trustee, dated January 17th, 1884, in reference to the liability of Hugh W. Sheffey, as a stockholder of the defendant company, the exhibit filed therewith being an offer of compromise made by said Sheffey, to which reports there are no exceptions, and was argued by counsel. On consideration whereof, and it appearing that by reason of the inability of the said two stockholders collections of amounts greater than they offer to pay could not be enforced; and it further appearing from said reports of the trustee that it will be to the advantage of the fund and of the other stockholders to accept said offer on the grounds and for the reasons set forth in said reports, it is adjudged, ordered, and decreed that John Gleen,
73 trustee, is hereby authorized, on prompt payment by the said Thomas Opie of the sum of five hundred dollars, to grant to said Thomas Opie an acquittance and discharge of his liability as a subscriber to sixty shares of the stock of the defendant company;

and the court doth for like reasons further adjudge, order, and decree that the said trustee, on prompt payment of the sum of one thousand dollars by Hugh W. Sheffey, is authorized to grant unto the said Hugh W. Sheffey an acquittance and discharge of his liability as a subscriber to one hundred and fifty shares of the stock of the defendant company; and the court doth further adjudge, order, and decree that William J. Leake, Esq., one of the commissioners of this court, do proceed with all convenient speed to ascertain and report to the court the order of priority in which the debts due by said National Express and Transportation Company shall be paid out of any property and assets conveyed by the said deed of trust of the 20th day of September, 1866; and the said commissioner is directed to report specially any matter deemed pertinent by himself or which any party in interest may require to be specially stated by him.

And at another day, to wit, at a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 11th April, 1884.

JOHN HOWARD, Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

This day came Thomas J. Jennings, Goode Bryan, and Charles B. Purcell, by counsel, and moved the court for leave to file their petition herein. To the granting of such leave the complainants, by counsel, objected. On consideration whereof the court doth allow the said petition to be filed and remands the same to the rules to be matured.

And at another day, to wit, at rules held in the clerk's office of the said court, on the 1st Monday in May, 1884.

This day came John Howard, counsel for the defendants in the last above-named petition and in his own proper person as plaintiff in this suit, and waived process and service thereof on said petition, and failing to answer said petition it is ordered that unless the said defendants should appear at the next rules and plead,
74 answer, or demur to said petition the same would be taken for confessed as to them and the matters thereof decreed accordingly.

At a chancery court for the city of Richmond, continued by adjournment and held for the said city on the same day, to wit, on the 27th of June, 1884.

On the said last-named 27th day of June, 1884:

JOHN HOWARD, Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. and *als.*, Def'ts.

On motion of the plaintiff, it is ordered that this cause be removed

to the circuit court of Henrico county, to be proceeded in, heard, and determined by that court according to law.

The foregoing is a true copy of all the rules and proceedings in the foregoing cause.

Teste: BENJ. H. BERRY, *Clerk*

Clerk's fees, $108.06.

Teste: BENJ. H. BERRY, *Clerk.*

In the circuit court of the county of Henrico, continued by adjournment and held for said county, the 1st day of July, 1884.

W. W. GLENN'S ADM'R
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

It appearing from an order of the chancery court of the city of Richmond of the 27th day of June, 1884, that this cause has been removed from the said chancery court to this court, the same is hereby ordered to be placed upon the docket of this court, to be hereafter proceeded in, heard, and determined in this court according to law.

In the circuit court of the county of Henrico, continued by adjournment and held for the said county, the 10th day of July, 1884.

GLENN'S ADM'R
vs.
NAT'L EX. AND TRANS. CO., &c.

On motion of the plaintiff, the death of the petitioner, J. J. A. Trotter, is suggested.

75 And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, Dec. 4, 1884.

GLENN'S ADM'OR and Others
vs.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

In accordance with directions to the clerk of this court by Green Peyton, this day filed, bearing date the 2d day of December, 1884, the petition heretofore filed by him in this cause for a rehearing of various decrees and any other proceedings taken in his name in the cause for the same purpose are hereby dismissed.

At a circuit court of the county of Henrico, continued by adjournment and held for said county, December 9th, 1884.

GLENN'S ADM'R and Others, Pl'ts,
against
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others, Def'ts.

It appearing to the court that this suit has abated as to the estate

of the petitioner, J. A. J. Trotter, and it being represented to the court that said estate is insolvent, and that John E. Hurst and others and Thomas L. Farish and others, stockholders, who filed petitions herein for a rehearing of the decree of December 14th, 1880, and upon which the order of 21st July, 1883, was entered, have accepted the terms thereof, the petition of the said Trotter and the said petitions of the several other stockholders aforesaid are hereby dismissed, and John Glenn, trustee of the defendant company, is directed to proceed to execute the said decree of December 14th, 1880 (entered by the chancery court of the city of Richmond, from which court this cause has been removed and transferred to this court according to law), as if the said order of July 21st, 1883, had never been entered.

At a circuit court of the county of Henrico, continued by adjournment and held for said county, February 21st, 1885.

GLENN'S ADM'R
vs.
NATIONAL EX. & TRANS. CO. & *als.* } In Chancery.

On the application of the plaintiffs it is ordered that Wm. J. Leake, who is acting as a special commissioner of this court in this cause, be, and he is hereby, directed to make a complete copy
76 from the record book of the board of directors of the defendant company, heretofore produced and proven by John J. Kelly, of the proceedings of the said board had on November 1st, 1866, and certify the same and file it with the clerk of this court as speedily as possible.

Report of Commissioner Leake under the Foregoing Order. Filed Feb. 25, 1885.

Called meeting.

RICHMOND, *Nov.* 1*st*, 1866.

Present: M. G. Harman, vice-president; H. G. Fant, Wm. Devries, C. R. Mason, D. J. Foley.

The resignation of Mr. Echols was offered and accepted.

Mr. Jos. R. Anderson, of Richmond, was unanimously elected a director, vice Echols resigned, and took his seat.

The resignation of Mr. H. G. Fant was offered and accepted.

The resignation of Gen. Jos. E. Johnston, as director and president, was read and unanimously accepted.

Mr. R. P. Zimmerman, of Atlanta, Ga., was unanimously chosen director, vice Fant resigned, and took his seat.

The resignation of Mr. C. R. Mason was offered and accepted.

Also that of Mr. Austin Dall.

The following-named gentlemen were unanimously elected directors, viz: J. Carter Marbury, vice Mason resigned; Lorenzo Norvelle, vice Johnston resigned; Wm. H. Perot, vice Dall resigned.

The resignation of Wm. J. Hawkins was offered and accepted and W. H. Webb elected.*

* NOTE BY COMMISSIONER.—The words "the resignation of Wm. J. Hawkins was offered and accepted and W. H. Webb elected" are in pencil in the original and are copied herein in pencil in like manner.—W. J. Leake, com'r.

By Mr. MARBURY: Whereas it is the desire of this company to meet all of its obligations at the earliest possible moment by
77 carrying out the provisions of the deed of trust made by this company on the 20th day of September, 1866, by forcing by all legal means the delinquent stockholders to pay up their arrearages:

Be it resolved, That the gen'l sup't, Jno. J. Kelly, Esq., be directed to immediately suspend all the business operations of the National Ex. & Trans. Co. at all points, dismissing all the employees of the company, excepting the treasurer and a sufficient number of teamsters to take care of the horses.

Resolved, That the vice-president be directed to turn over all the property of the company to the trustees appointed under the above-recited deed of trust, with the request to them that they will advertise to receive proposals on the tenth (10th) day of December next for the purchase of the same in mass, and, failing to get a satisfactory bid for the same, to sell the same on the appointed day to the highest bidder, and that a list of all the property shall be open for the inspection of bidders at all the principal offices of the company;

Provided, That if the said company shall on or before said day pay off the obligations in said deed secured and set forth, the said property shall be redelivered by the said trustees to the said company or its agents.

Resolved, That the president, or, in his absence, the vice-president, be directed to place all the claims against delinquent stockholders in the hands of competent persons for collections, with directions to pursue the utmost limit in enforcing the payment of the same, allowing not over five (5) per cent. for collecting the same. When paid all such sums shall be paid over to the trustees for distribution amongst the creditors according to the terms of the trust, the board deeming it just that all delinquent subscribers shall be required to pay up before new requisitions be made.

Adopted unanimously.

By Mr. ANDERSON: Resolved, That the president, or, in his absence, the vice-president, be instructed to apply to the General Assembly of Virginia, if practicable, on the first day of the ensuing session to make such amendments of the charter as were indicated by the stockholders at their recent meeting, and, in addition thereto, an amendment authorizing the company to buy in the stock of delinquent stockholders, if, upon legal advice, there be no objection thereto.

Adopted unanimously.

By Mr. HARMAN: Resolved, That the vice-president be directed to bring a suit for damages for — dollars against the Adams Express Co., or individuals of the same, provided eminent coun-
78 sel can be found to bring the suit upon a contingent fee of 50 per cent., with a certain fee of $500.

Adopted by following vote:
Ayes.—Zimmerman, Marbury, Foley, Anderson, Harman.
Noes.—Devries.

Wm. H. Perot was next elected, by a unanimous vote, president of the company, at a salary of twenty-five hundred dollars ($2,500) per annum, and Mess. Devries and Foley were appointed a committee to wait upon Mr. Perot, inform him of his election as president, and request his acceptance of said position. On motion, Mr. Harman was substituted vice Devries as one of the executive committee of the company.

On motion, the meeting adjourned *sine die*.

M. G. HARMAN,
Vice-President.

J. V. H. ALLEN, *Secretary.*

COM'R'S OFFICE, RICHMOND, VA., *Feb'y* 21*st*, 1885.

GLENN'S ADM'R
vs.
NATIONAL EXPRESS & TRANSPORTATION COMPANY & *als.* } In Chancery.

To the circuit court of Henrico:

Pursuant to the order made in this cause on this day, the undersigned has caused to be made the foregoing copy of the proceedings of the board of directors of the National Express & Transportation Company at a meeting held on November 1st, 1866, as appears on the record book of said board of directors, being the same book produced by John J. Kelly with his deposition taken before Com'r Kean on April 26th, 1880, and therein styled "Record N. E. & T. Co., Board of Directors;" and I hereby certify that the foregoing is a true copy.

Given under my hand this 21st —, 1885.

WM. J. LEAKE,
Com'r in Chancery.

79 *Petition of Thomas J. Jennings and Others in the Chancery Court of the City of Richmond, April*, 1884, *Referred to on p.* 208, *supra, of this Record and Filed April* 11, 1884.

In the Chancery Court of the City of Richmond.

W. W. GLENN'S ADM'R *et al.*
vs.
THE NATIONAL EXPRESS & TRANSPORTATION CO. *et al.*

Petition of Thomas J. Jennings *et al.* Filed 11th April, 1884.

By leave of the court—

Your petitioners, Thomas J. Jennings, Edward B. Purcell, and Goode Bryan, of the county of Richmond, State of Georgia, respectfully represent that they are holders of certificates of the capital stock of the said National Express and Transportation Company,

and as such holders interested in the proceedings in said cause had and to be had.

Petitioners were not served with any process in said cause; were not made parties defendant, and, living in a distant State, had no notice whatever of any kind of the pendency of said proceedings until in October, 1883, and then had the scant notice of a demand for an assessment decreed against them without notice or day in court, which put them on inquiry; and now, at the first term of said court, after their ascertainment of the facts connected with the rendition of the partial or interlocutory decree in said cause, made on the — ——, ——, by your honorable court, petitioners come, by their counsel, and petition to have the said cause reheard and the manifest injustice of said decree corrected, as well for petitioners as for all others like interested with them who may join petitioners under the proper orders of the court here to be granted; and, for grounds entitling petitioners to have said decree opened and a rehearing had, petitioners aver that the record of said cause discloses the following, to wit:

1. There was no appearance for any of the defendants in said cause against whom substantial relief was prayed.

2. There was no relief decreed against any defendant in said cause who did appear.

3. By the said decree a large number of judgments, aggregating in amount many thousands of dollars, to wit, two hundred thousand dollars, or some such sum, were granted to various parties or persons who had never by proper proceedings become parties complainant in said cause before said judgments were granted in their favor against the said National Express and Transportation Company.

80 4. By said decree the report of the commissioner of said court was confirmed, in which report was incorporated a finding of an immense sum of money against said National Express and Transportation Company in favor of persons not complainants in said proceedings, and of whose claims no notice whatever of any kind was given to said National Express and Transportation Company before the time that they (said claims) were passed on by said commissioner and adjudicated against said defendant company (and as a consequence against petitioners, if they shall be held to be stockholders in said defendant company) by the said decree, said sum being all of said amount decreed as the indebtedness of said defendant company, except the claim known as the Glenn debt, on which said suit was originally brought.

5. Petitioners are advised that the service of said complainants' writ was illegal on the parties defendant purporting to have been served, being advised that it appears of record in your honorable court that the officer perfecting such pretended service on the pretended officers or agents of said defendant company was at the time of such service the deputy of the administrator of the said W. W. Glenn; and being further advised that under the laws of Virginia the title to personalty of estates vests in the administrator, and that

it appears of record in this cause that said suit was regarding personalty.

6. Petitioners are advised that it appears from the record in said cause that the service on said defendant corporation was not in accordance with the statute in such cases made and provided.

7. Petitioners are advised that said decree is based upon a bill in equity lacking in substantial parties defendant; that it appears from the record that the substantial relief prayed was against the stockholders of the capital of said defendant company; that said bill averred there were no assets of said defendant company, save the said capital stock; that said bill averred that there were stockholders in the State of Virginia, but that it appears from the record of said cause that no one of said stockholders was made party defendant as such; that no stockholder appeared and defended, and that the class against whom the only real relief was decreed was not sued nor served, nor by any representative appeared and defended.

8. Petitioners are advised that it appears from the record of said cause that said decree by default was granted without proof made to the court that the precedent conditions of the charter authorizing the said defendant company to sue and to be sued, to do business and contract debts, were ever complied with.

9. Petitioners are advised that it appears from the record in said cause that the original contract of subscriptions of stock were never placed in evidence before the court granting said decree, which said decree was based upon a report as to the said stock subscribers and the said adjudicated indebtedness.

81 10. Petitioners are advised that said decree by default was granted in the absence of proof to the court granting the same that the pretended officers or agents, directors, cashier, and president of said defendant company, by service (of the character aforesaid) on whom the complainants seek to bind said defendant company, were ever lawfully elected or appointed to their said offices or ever acted as such in and about the affairs of said defendant company; petitioners being further advised that the question as to the legal existence of said corporation, its officers and agents, and who they were and how appointed or elected, was not nor by its nature could not have been submitted to the said commissioner, and that proof before said commissioner on that subject should not have operated as proof to the court in the granting of said decree.

11. Petitioners are advised that it appears from the record of said cause that all of said pretended indebtedness for which decree was had against said defendant company, except the said Glenn claim, was *prima facie* barred by the statutes of limitation, and that no proof was submitted to the court granting said decree relieving said claims of indebtedness from the operation of said statutes, but that the same appeared to be stale demands.

12. Petitioners are further advised that the court appointing the said John Glenn as trustee, the said Glenn being at that time a non-resident, to wit, resident in the State of Maryland, had no jurisdiction of the person of said trustee and no jurisdiction to make said

appointment; and petitioners pray that complainants in said cause may be duly served with legal notice of this their petition and required to show cause, if any they can, why this petition should not be granted, said complainants being John Howard, Esq., administrator *de bonis non* of the estate of W. W. Glenn, deceased, the Baltimore and Ohio Railroad Company, and various others, as appearing from the records of said cause.

And petitioners, verifying the foregoing grounds by the records of said cause here in this court remaining, pray that said *ex parte* decree may be set aside and a rehearing had to the end that equity may be done; and will ever pray, &c.

A. H. COX,
Pet's' Att'y and Counsellor.

At a circuit court of the county of Henrico, continued by adjournment and held for the said county, January 27th, 1885.

GLENN'S ADM'R, &c., Pl'tffs,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & Others, Def'ts.

On motion of the complainants — the other creditors whose
82 claims were established by the decree entered in this cause on the 14th day of December, 1880, it is ordered that the order entered at rules on the last Monday in May, 1884, in the matter of the petition of Thomas J. Jennings, Goode Bryan, and Charles B. Purcell be set aside, and by leave of court said complainants and creditors this day filed their joint and several demurrers and answer to the said petition, and the hearing of the same is continued until Tuesday, the 3d day of February next.

Demurrer and Answer to the Foregoing Petition.

In the Circuit Court of Henrico County.

GLENN'S ADMINISTRATOR and Others
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

In the matter of the petition or bill of Thomas J. Jennings, Edward B. Purcell, and Goode Bryan, stockholders of said company, in behalf of themselves and for all others in like interest.

The joint and several demurrer and answer of John M. Glenn, administrator *d. b. n.* of the estate in Virginia of W. W. Glenn, dec'd (recently appointed as such in place of John Howard, who was appointed and qualified only for the special purpose of reviving the suit upon the death of John W. Wright, formerly administrator, and who was removed at his own request and in accordance with the understanding at the time of his appointment and qualification), the Baltimore and Ohio Railroad Company, the Bank of Commerce (of Baltimore); Francis Murray, for the use of John R. Terry, &c.;

Henry M. Bash, trustee; Luke H. Miller, the Philadelphia, Wilmington and Baltimore Railroad Company, the Richmond, Fredericksburg and Potomac Railroad Company, the Richmond and Danville Railroad Company, the Wilmington and Weldon Railroad Company, in behalf of themselves and all others, creditors of the said National Express and Transportation Company, whose claims against said company are established in this suit, to a certain petition or bill filed on the 11th day of April, 1884, by the said Thomas J. Jennings, Charles B. Purcell, and Goode Bryan.

The said demurrants, jointly and severally, say that the said petition or bill is insufficient in law and ought not to have been permitted to be filed, and for reasons appearing upon its face and upon the face of the record in this suit, to which it refers and which is to be considered in connection therewith, they,
83 jointly and severally, demur to the said petition and pray that it may be rejected and dismissed with costs.

And, without waiving, but still insisting upon, their said demurrer, the said creditors, for answer to the said petition, say that they promptly, by counsel, entered their appearance to the said petition, at the May rules (1884), by a special appearance, filed in writing, prayed to be considered as part hereof, and that they were then and have at all times since been in readiness to give the said petitioners a hearing upon their said petition; and that as they promptly appeared to the same to prevent delay and expense, so they have ever been willing and anxious that that object should be accomplished by a speedy hearing, and that it has been by no fault or default on their part that such hearing has not before been had; and while they do not impute to the said petitioners intentional delay in this matter for wrongful purposes, certain it is that the delay has operated to the advantage of the petitioners by procuring continuances and preventing a trial of the suits in Georgia, brought by the trustee against them under said decree of the 14th December, 1880, because of the pendency of said petition in this suit; and certain it is that the pendency of the said petition has operated greatly to the detriment of these respondents and to the efficient execution of the said decree and of the trusts of the deed of trust of the company, which, by said decree, for the first time after a lapse of fourteen years, was placed in a condition to be executed; for, as will hereinafter more fully appear, the pendency of said petition and others recently dismissed by this court has disastrously retarded and in large part suspended the execution of the said decree, and of course the trusts of said deed, to the incalculable loss of the trust fund and the imminent danger of its inadequacy to satisfy the said trust; while all of the courts before which, upon suits brought by the said trustee against stockholders by authority of said decree and said deed of trust, in which a trial has been had, have uniformly sustained the validity of the proceedings of the chancery court of the city of Richmond, in which the suit was instituted, the trial of a vast number of suits pending in the different States has been virtually arrested by the pendency of said petitions.

Respondents further state that already three several similar petitions have been filed by delinquent stockholders in behalf of themselves and others, and, after a full hearing, such redress was had by compromise as was satisfactory to them as representatives of all of the stockholders, as will be fully hereinafter shown, and respondents here *in limini* respectfully protest against the hardship and injustice of having, from time to time and term after term, to be called upon to answer petition after petition, without end, of a few out of a thousand stockholders of a company whose only claim to *locus standi* in court is grounded upon their own laches and default
84 for nineteen years in the performance of plain, legal, and moral duties of the highest obligation.

In the hope and trust that this will be the last of such petitions permitted to be filed or entertained for any purpose, these respondents will proceed to answer the same, by way of convenience to this court, now new to the case (from recent transference to its jurisdiction), and to save time and labor in specially referring to the voluminous proceedings at large.

And in the first place respondents say that it is true the said petitioners were not made parties defendant, and for obvious reasons; in the first place, they were neither necessary nor proper parties and might have successfully demurred to the bill if they had been made parties, and, secondly, because "living in a distant State," they were beyond the jurisdiction of the court and could not by any means be served with process if proper parties, which they were not.

The whole proceedings were had to obtain the due execution of the trusts of said deed of trust executed by the company on the 20th September, 1866, for the payment of its debts, and was brought by leading creditors in behalf of all secured by the deed against the company, its officers, and the trustees in the deed, and it is new law that in a suit to enforce the execution of the trusts of a deed of trust made by a corporation to pay debts or to foreclose a mortgage given by a corporation for the same purpose the stockholders in the corporation are either necessary or proper parties. By the very constitution and nature of such an organization the corporation and the corporate agents represent the stockholders, who act and are acted upon only through them.

And now taking up *seriatim* the enumerated grounds of equitable interference in behalf of said three small stockholders:

1. As to the first ground, to wit, that there was no appearance for any of the defendants in said cause against whom substantial relief was prayed, respondents say that the statement is not true in fact, because the trustees did appear, and important relief was sought and obtained against them in removing them from office, but that, assuming the allegation to be entirely true, it is a matter for which these respondents are not responsible, as it was not in their power, nor was it their duty, if in their power, to compel the defendant company to appear and defend itself; and respondents further say that if the petitioner and his co-stockholders did not choose to keep up an efficient directory for due attention to their affairs, it was their own fault and default, and they cannot plead

their own laches as a ground for setting aside a decree obtained upon process against this company, duly served according to law. These respondents were constrained to take a decree against the company by default or not at all, and they have yet to learn that a decree had by default, upon process duly served, is not as valid
85 and binding as any other on all the parties against whom it is so taken, and they are advised that if the law were otherwise adversary judicial proceedings would be impossible.

2. As to the second allegation, to wit, that there was no relief decreed against any defendant in said cause who did appear, respondents say the same is not true, because the trustees as aforesaid did appear, and practical and important relief was obtained against them in the fact of their removal; but if the allegations were true respondents would be at a loss to see in the circumstance any reason to set aside said decree unless the jurisdiction of the court, in the administration of justice, is to be made dependent, as now contended, upon the pleasure of the defendants sued, and can be defeated at will by their voluntary disregard of the process of the court.

3. In respect to the third allegation, to wit, that judgments to a large amount were granted in favor of various parties who had never by proper proceedings become parties, the statement is wholly untrue and must have been made in profound misconception of the nature of the proceedings had before a commissioner in Virginia taking accounts under an order of court upon a creditors' bill of debts secured by a trust deed and to be paid out of the trust fund thereby granted for the purpose. The report of the commissioner of the 19th of June, 1880, was but the execution in the usual and regular way of the decree for an account of the debts and assets of the company entered 6th October, 1879, and in point of fact every claim proved before the commissioner and established by the court in its decree of December 14, 1880, was represented by counsel and known to be so both by the commissioner and the court, and the fact of such representation appears of record.

4. In respect to the fourth allegation, it is somewhat the same in substance as No. 3, and is based upon a like misconception of the nature of the proceedings under a creditors' bill and the common practice therein. The company was first duly served with process in the manner prescribed by law, and the cause having been duly matured the said order for an account of debts and assets was entered on the 6th of October, 1879, and after due publication of the time and place of taking said accounts the same were duly taken and reported, and the said company and all parties concerned had full legal notice of all the said proceedings in the manner prescribed by statute law and familiar in practice in Virginia.

5 and 6. Regarding the allegations contained in specifications No. 5 and No. 6 of said petition, respondents are advised that, taken together, they constitute but one ground of contention, which is—that process was not duly served upon the company because it was served by a deputy sheriff whose superior officer was, as administrator in Virginia of W. W. Glenn's estate, the com-
86 plainant in the creditors' bill. But respondents say that here

again the petitioners have entirely mistaken the law and practice thereunder in Virginia. The service of the summons as to the company was a good and valid service. The sheriff was not a party in his own right and was party only as auxiliary administrator of a foreign intestate, who owed no debts in this State and owned no property in this State, except the claim in this suit; but if the sheriff had been plaintiff in his own right, by the law of Virginia the summons might have been served as a notice is served, and the notice may be and constantly is served by the plaintiff himself.

And in the absence of an express statute authorizing this to be done, by the immemorial common law in force in the State a sheriff, though plaintiff, may serve a summons in a suit. Here the sheriff was, in point of fact, merely a nominal and technical plaintiff (the real person to receive from the court or from the trustee in the deed of trust being the Maryland administrator of said W. W. Glenn's estate), and the fact is that John M. Glenn, of Baltimore, Maryland, one of the children of said W. W. Glenn, is now the administrator in Virginia of said estate, and the further fact is that said sheriff, nominal plaintiff as aforesaid, was only one of many plaintiffs who were, in legal effect, all of the creditors of the company in whose behalf the suit was brought, and who subsequently appeared therein and took the benefit thereof. The service was in accordance with the long usage and practice of the courts of this city and of the said chancery court of the city of Richmond, in which the suit was brought, ever since it was a court, and no question was ever made about the regularity of such a service until made in this case. But if the service was irregular, which is denied, the objection should have been made by the company itself by plea in abatement, and could not be made now even by it after a decree by default; much less can it be made by default by defaulting stockholders, debtors to the company, in order — evade payment of the company's debts out of a trust fund for that purpose wrongfully kept in their hands, and the objection, if valid, would be equally valid in an action at law by the trustee upon said assessment against said stockholders as if made in this suit; but the objection is frivolous, as has been shown.

7. As to pretension No. 7, respondents are advised that all of the parties were before court necessary for the jurisdiction it assumed and exercised. All of the creditors of the company were duly brought before the court by the creditors' bill and the proceedings thereunder. The company was duly served with process, as were also the president and directors and the trustees, and the trustees appeared and answered the bill. The whole object of the suit was,

87 in general terms, to obtain an execution of the trusts of said deed of trust executed by the company for the payment of its debts, and to this end an assessment upon the unpaid subscriptions of the stockholders conveyed by said deed as debts due to the company, and which, without such deed, were pledged by law to the payment of the company's debts.

And the novel proposition is now asserted that the debtors to the company who, by the act of the company, owe that fund to the trustee were necessary individual parties to a suit authorizing the

trustee to collect the trust funds in their hands—that is to say, in a suit against a corporation to enforce the payment of its debts out of the corporate property it is necessary to have personally before the court all of the debtors to the corporation, because the money is to come out of them with which the debts are to be paid.

The petitioners, by becoming stockholders, without paying their subscriptions in full, necessarily became debtors to the company according to the terms of the contracts of subscription; but the fact of such indebtedness, while it created an obligation of payment, conferred no rights upon the debtor as such. All of the rights of such a person were the inchoate rights of a stockholder, and accrued to him only in that capacity. And then the question arises whether, in a suit against a corporation to enforce the payment of its debts, the stockholders as such are necessary parties, and that question answers itself. The distinctive characteristic of a corporation or joint stock company of this kind, the chief, if not only fundamental, element and condition of its existence, is the faculty conferred upon a number of persons of contracting and being contracted with and of suing and sued upon such contracts as one person in the name and by the instrumentality of a collective agency, and its charter is but an agreement between them and the State by which the corporators or members of the company consent in advance to that mode of business and of procedure, and hence notification of legal proceedings given in that mode is binding on the collective body and upon each and all of its component parts. It is a great privilege and convenience for a multitude of persons to be able to contract and be contracted with and to sue and be sued as one person and to be liable only for a specified amount for the contracts thus to be made and enforced, and when contracts have been thus made and suit has thus been brought and jurisdiction thus acquired to enforce them it does not lie in the mouth of any member of the company to say that in addition to suing and serving process upon him and his associates collectively, in the manner agreed upon beforehand in their charter or articles of association, and thus after having fully obtained jurisdiction to enforce the social contracts out of the social property upon the express terms upon which those contracts were made and that property acquired, it was also incumbent on the creditors, who had trusted to and acted upon that agreement and basis of things, to sue each corporator individually in the same suit and serve him
88 individually with process as conditions precedent to jurisdiction over the corporate contracts and property. By the charter of this company, constituting, with the general statute law of the State, its articles of association, it is expressly provided that J. E. Johnston and others named and their associates, successors, and assigns should be a body corporate and politic, by the name of the National Express and Transportation Company, for the purpose of an express and transportation business, and as such to sue and be sued, plead and be unpleaded [impleaded], contract and be contracted with, and should have power to make ordinances, by-laws, and regulations for the government of all under their authority and

the proper conduct of its affairs; and it was further expressly provided that the said company should elect "stockholders to act as directors, who shall represent the said company and manage the business thereof;" and in pursuance of these provisions there was constituted and continued a president and board of directors, as active managers of the company, having full power and charged with the duty of representing the company and taking care of all of its affairs. By the general law of the State and the express terms of said charter said officers were to continue in office until their successors should be appointed; and by the general law of the State also said corporation was to continue in existence and was to sue and be sued in respect of its contracts and property indefinitely until all of its liabilities should be enforced and its property distributed among those entitled thereto. It was upon these conditions and this basis and understanding that credit was given by the public to this company for whatever it required in the prosecution of its business, and it has been upon the same conditions, basis, and understanding that this suit was brought and has been proceeded in to enforce the liabilities thus contracted; and these respondents are advised and insist that no one or any member of the more than one thousand persons who compose this company and who are scattered over twenty-one States and two continents can acquire any right to set aside the fundamental conditions aforesaid or claim to be individually sued upon the corporate contracts by reason of the failure and neglect on their part to keep up an efficient directory to represent them in respect of the business of the company and all litigation touching the same. By their laches and the dereliction of their agents, encouraged and permitted by their own acquiescence and example, they could neither deprive the creditors of the company of plain legal rights acquired under its charter and the general law of the land nor create any new rights for themselves, and it would be monstrous if contracts authorized and made under a fundamental law with one juridical person and to be enforced by suit against one juridical person, the legal representative of a thousand or any number of natural persons, could thus, in defeat of law, right, and
89 justice, be converted into individual contracts made with the thousand natural persons, and be enforced only by suit against each *eo nomine*, scattered in different jurisdictions over the face of the earth and impossible to be reached by legal process. Respondents are advised that the stockholders of this company, after having agreed to be contracted with and to be sued in the manner above stated, and taking the chances of making a profitable speculation in that way, upon a limited liability, could not elect, when the speculation proved disastrous, to abandon the enterprise, throw all the burden of its losses upon their creditors, and by their negligence and default fail to keep up an active representative agency, and then claim immunity from the legal effect of a decree rendered against the company in accordance with the terms of their original agreement and the express provisions of statutes enacted to prevent such an outrage.

Said petitioning stockholders, being citizens and residents of Georgia, were in fact out of the jurisdiction of this court, and could not personally be brought within it by any process of law, and it is not for them to complain either of not having been individually sued themselves or that other stockholders, residents of Virginia, were not so sued, when those stockholders have not chosen to make such complaint on their own account, and who, if they had been sued, could have successfully demurred to the bill for having made them parties, which has been the law for two hundred years.

Upon the whole respondents are advised and insist that said decree is a valid decree against the said company; that if it is so valid against the company, it is alike valid against the stockholders, and they are bound thereby; that if it be not so valid, by reason of the personal absence of said petitioners, they can take advantage of the fact elsewhere and in every jurisdiction as well as in this suit; that they have been by their own agreement in advance embraced in the express terms of the charter of said company lawfully sued in the name and by the agency of the company, whose directory represents them in all things; and that the validity of these proceedings cannot be impaired by virtue of the nineteen years default of the petitioners in providing themselves better representatives, or by virtue of their neglect now to call upon those representatives to act or to take any steps towards replacing them by others more efficient in attention to the business of the company, or by virtue of the profitable immunity which the said stockholders have so long enjoyed and secured to themselves, simply by doing nothing towards the fulfillment of their clear duty, and by that means of interested laches, to the utter disregard of the rights of the creditors, have avoided the assessments necessary and proper to be made for the payment of the debts of the company, and which it would have been the first business of a faithful directory to make
90 and assist in enforcing by the trustees charged to collect the same. The pleadings, proofs, records, and proceedings had and filed in this case abundantly show that it was only after having been obstructed and baffled for fourteen or fifteen years by the officers of the company (allowed to remain in office by the stockholders) and by the original trustees in the deed of trust (selected *in invitum* as to the creditors), who were acting in concert with prominent stockholders, that the creditors were at last enabled, by getting possession of the books of the company in 1879-'80, to obtain the evidence essential to the prosecution of this suit, the institution of which was rendered necessary by the said profitable laches of the stockholders and the co-operative inaction and default in duty of their agents and trustees. In point of fact, by a fraudulent general stockholders' bill against the company, its officers, and the trustees in said deed pending in the circuit court of the United States for the eastern district of Virginia from the 8th day of August, 1866, until the 11th day of December, 1880, the trustees in said deed were enjoined and restrained from proceeding to execute the trusts in favor of the creditors, and the injunction was then dissolved and the suit dismissed only on the motion of said cred-

itors, in order that they might be disentangled by the pendency of those proceedings in the prosecution of those instituted by themselves. And a similar general stockholders' suit against the said company, its officers, and the said trustees, originally brought in a State court of the city of New York in September or October, 1866, and afterwards removed to the circuit court of the United States for the southern district of New York, is still pending and a similar injunction is still in force. The substituted trustee appointed by the chancery court of the city of Richmond, and now executing the duties of his trust under the supervision of this court, has not been able to proceed against the stockholders in that State because of the pendency of that suit and injunction, and he has been deterred from appearing therein and asking for a dissolution of the injunction because of the successive petitions filed by different sets of stockholders in this suit praying for a rehearing of said decree of the 14th of December, 1880, and obstructing its execution in every possible way. During the unmolested pendency of the said stockholders' suit and injunction in the circuit court of the United States for the eastern district of Virginia the stockholders everywhere seemed to be content, as inaction in the collection of unpaid subscriptions for satisfying the debts of their company was continuing exemption on their part from doing their duty in bearing the losses of their speculation instead of casting them upon their creditors. But as soon as those creditors, after so many years of vain effort, succeeded at last in 1879–'80 in obtaining the books of the company, and thus the evidence essential to the successful prosecution of this suit—that is to
91 say, essential to the ascertainment of the debts of the company, in order to the levying of a proper assessment and to the discovery of the names and locality of the stockholders in the different States, the amount of their several subscriptions, the assignments of stock, and the several assignors and assignees thereof, all of whom are by express statute made responsible for the payment of the unpaid subscriptions; as soon as the long-baffled and defrauded creditors, having obtained these means of self-protection, proceeded regularly, in accordance with the statute law and the general and established principles and practice of chancery, to have done by the court what the official agents of the company, the company itself, its stockholders, and its chosen trustees had so long failed to do and had obstructed and prevented from being done, and the decree of December 14th, 1880, was entered and an efficient trustee appointed clothed with the power and duty of suing the defaulting stockholders for an assessment upon their unpaid subscriptions, no sooner was this done than a new system of laches was set on foot by different sets of stockholders—that of filing petitions in this suit for a rehearing of said decree and the arrest of the whole proceedings.

All of the great labor, trouble, and expense of this suit, necessitating, besides large home expenses and costs, the employment of counsel and institution and costs of suits in twenty-one different States of the Union against recusant stockholders, would have been

long ago avoided if the stockholders themselves had done their plain duty; and now when sued on the original decree of assessment in this suit of December 14th, 1880, as the said petitioners have been sued to compel the enforcement of a long-neglected and advantageous breach of legal and moral obligations of the highest dignity, they come forward at last, at the end of the law in their several States, and, to avoid payment of the judicially ascertained debts of the company, seek to get rid of a decree rendered by default, when the default was due to their own long laches and deglect of duty, alike to the creditors and to themselves.

And they do this without offering any indemnity or security against the great loss and damage that must necessarily result from setting aside said proceedings, which would suspend or set aside also the hundreds of suits based thereon in the different States, render useless the large expenditures already made or incurred in costs and counsel fees therein, as well as in this the mother suit; and without offering any indemnity or security against the infinitely greater loss and damage to the trust fund by reason meanwhile of the death, insolvency, and embarrassments of other stockholders, during the delay incident to the pendency and prosecution of proceedings *de novo* in this court, at the instance of these three Georgia stockholders, of whose solvency nothing is alleged or known.

92 And respondents are reliably informed and here state the fact to be that the great majority of the Georgia stockholders are embarrassed, if not insolvent, and that it will be difficult, if not impossible, to collect from them by any process of law even the assessments made by said decree.

Respondents, in this connection, beg leave to refer, as if herein incorporated, to the various official reports made by John Glenn, trustee, showing the condition of the trust fund and also showing how absolutely necessary it is that the promptest and most efficient steps should be taken for the further collection of the trust fund necessary to pay the large indebtedness of the company and the great expenditure of litigation and costs in collecting the same. It is extremely doubtful, indeed, whether the whole of the solvent subscriptions will pay the debts of the company and the expenses of enforced collection; and it is under these circumstances that three only of a thousand stockholders, and these in a distant State and who dispute the fact of their being stockholders at all, gravely ask this court to set aside all of the proceedings of the chancellor of the chancery court of the city of Richmond regularly had in this cause and all of the proceedings based thereon already had in this honorable court since the cause has been transferred to its jurisdiction.

8. In regard to the allegation that it appears from the record that said decree by default was granted without proof being made to the court that the precedent conditions of the charter authorizing the said defendant company to sue and be sued and to do business and make contracts were ever complied with, respondents say that the fact of the legal organization and existence of said company was not put in issue in this suit and could not, indeed, have been thus collaterally inquired into; but if the fact of such organization or any

fact necessary to show the same had been put in issue it would have been proved.

9. In respect of the allegation that it appears from the record that the original contracts of subscription were never placed in evidence before the court granting said decree, respondents are advised that the same is wholly immaterial. By express statute the persons in whose names shares of the stock stand on the books of the company are the owners thereof, as regards the company, and the commissioner properly reported to the court from the books the stock thus appearing to have been taken and held; but neither the commissioner nor the court undertook to indicate or determine who were or are the stockholders in said company, which, indeed, would have been an idle absurdity and impossibility. When persons are sued upon said decree as stockholders it will be open to them to show, if they can, that they were never owners of stock in the company, and, if successful, will defeat the suit. That course is entirely open
93 to the petitioners in the suits brought against them by the trustee in the State of Georgia, and the jurisdiction to pass the said decree in no manner depended upon the fact whether or not the petitioners or any of them were original subscribers to said stock, or whether or not their original contracts of subscriptions were before the court when rendering said dec[illegible]e.

10. In reference to the intimation in said 10th specification respondents say that in point of fact full proof was before the commissioner, in the books of the company and otherwise, of the legal existence of said company and of the regular election of the officers named in the original and amended bills, and that ample proof appears in the record of every jurisdictional fact necessary for the maturity and proper hearing and adjudication of the suit, and the court so held in the said decree, wherein it is recited and determined that the cause had been regularly matured and proceeded in as to all of the defendants. Said petitioners do not venture to make any averment to the effect that said corporation has no legal existence or that its said officers were not duly elected, but only that proof was not furnished as to the same. Respondents are advised that the legal existence of said corporation is a matter that cannot be inquired into in this collateral way, but that if it could be it was not necessary to furnish proof of a fact not put in issue by the pleadings, and that for all of the purposes of this suit it was sufficient to aver and show that the said company acted as a corporation, and that in the absence of its reputed president the summons against it was duly served upon the only cashier it had in the city of Richmond, and also upon one of its directors resident in said city; and respondents say that not only was this done, but that for four successive weeks a copy of said summons was duly posted and was also duly published in the Richmond State newspaper, published in the said city, which of itself, in the absence of a proper officer upon whom service could be made, would have been, by express statute, a good legal service upon said company.

11. As to the intimation that the claims established by the said decree, except the Glenn claim, were barred by limitations, respond-

ents say that no plea of limitations was filed to any of said claims, but that if such plea had been filed all of said claims were secured by the deed of trust mentioned in the proceedings, and that as to remedies against the trust fund thereby dedicated to their payment no statute of limitation has any application, and that the remedy under said deed of trust will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment, and it abundantly appears by the record that all of the delay in the prosecution of said remedy arose from the illegal and wrongful conduct of the officers of said company and the trustees of said deed alike in failing to execute said trust and in thwarting the efforts of the creditors to enforce execution of the same by concealing and withholding from them the stock and
94 other books of said company, which, indeed, were only made accessible for the purposes of this suit in the fall of the year 1879, when, for the first time since 1867, they were produced by the surviving trustees. For a brief period in 1866 and 1867 the said books were in the possession of a receiver of said company, appointed by the circuit court of Baltimore, but the order of his appointment was soon revoked and set aside by the court of appeals of Maryland and the said books restored to the trustees, who ever since, until the fall of 1879 as aforesaid, acting with the knowledge and approval of the president and other officers of the company, refused to permit any creditor to have access to them; and, in the meanwhile, the stockholders of said company, including the said petitioners, have enjoyed the advantage, now sought to be indefinitely prolonged, of keeping in their pockets the trust fund dedicated alike by the law and by said deed to the payment of the debts of the company, and by abandoning their duty and supinely doing nothing have acquiesced in and secured the profitable wrong of hindering, delaying, and defrauding the creditors, now pleaded to perpetuate that wrong. When said petitioners subscribed for their stock in said company they well knew it was to be paid for only as called for by the president and directors, and, in point of fact, it appears from the books of the company that all of them actually paid one or more assessments thus made upon them. As stockholders, they afterward knew that the company stopped business, leaving a large amount of debts contracted and unpaid. With this knowledge they have permitted those debts to remain unpaid, thus throwing the losses of their speculation upon the public. They have failed to keep up an efficient directory to attend to their affairs, and have thus escaped any further assessments. Their agents have prevented the creditors from finding out the names and localities of themselves and their associate stockholders by withholding the books of the company; and after having in this manner obtained immunity from honest payment of their debts for nineteen years, they now come forward and ask that a decree establishing those debts should be set aside more than four years after it was entered, in order that, in the place of their legal representatives, they may plead the statute of limitations!

Respondents are advised, as before stated, that neither the said

petitioners nor any other stockholders were necessary parties to the said suit at the time said decree was rendered, and that the same is valid and binding upon the company and all of its stockholders. Respondents are further advised that no stockholder or set of stockholders is entitled to be permitted now to come in and ask either for a rehearing or a review of said decree; that the only lawful party to take such a proceeding is the company represented by its president or other proper officer, and that if such action was
95 thus taken by the company it would have no ground to stand on; that the said decree, by default, having been duly obtained according to law is as valid and binding in law as if obtained after appearance and contest by the company; that the omission or neglect of the company to appear and defend the suit was the omission and neglect of all the persons composing the company, whose duty it was to have an efficient directory in office for the purpose of attending to the company's affairs; that to permit now one set of stockholders to appear and attack the said decree would be to open the door wide for different sets at as many different times and in such numbers as might suit their convenience or fancy to do the same thing, and any decree that this court might enter would be subject to the same successive and unending guerilla warfare, in which no victory of the creditors could settle anything so long as any of the thousand stockholders of this company remained to come forward and ask to renew the attack, while, in the meantime, the debts of the company, admitted to be of large amount, would go indefinitely still longer unpaid and the solvent stockholders become fewer and fewer the greater the delay thus effected, to the advantage and immunity of these defaulting speculators upon the public, whose nineteen years' dereliction of duty is made the claim for continued dereliction.

This course has already been pursued in this case by several separate sets of stockholders, as above stated, and the relief they were content to take was granted to them and to the whole body of the stockholders in whose behalf they assumed and were permitted by the court to act. That relief was within six months from the 21st day of July, 1883, to get a release from the trustee of all indebtedness to the company upon payment of twenty-five per cent of the same to the trustee. These respondents consented to that decree and are bound by it, and they are advised and insist that under the circumstances all of the stockholders are also bound thereby; for while the court reserved for future consideration all questions raised by the petitions of said stockholders, yet all of said stockholders united in consenting to said decree as a compromise for the benefit of themselves and of the whole body of the stockholders in whose behalf said petitions were filed and who in legal effect and contemplation were represented by said acting stockholders. Actual notice of said compromise was given to the present petitioners, as well as generally to stockholders at large. All who desired had an opportunity to take advantage of the action thus taken by some in the name and on the behalf of all. Respondents are advised and insist that, unless each successive set of stockholders who may choose to

take the chances of profiting by a like proceeding is to be permitted term after term and year after year to obstruct the course of justice and arrest the administration of the trusts of said deed, it
96 must be held that the end of such proceedings has already been reached by the said decree of July 21, 1883.

Respondents are advised and insist that if, contrary to their most earnest and respectful protest, said petitioners should be allowed further to proceed in their undertaking, it should be only on being put upon terms to indemnify and save harmless these respondents for any loss or damage they may suffer in the premises and upon giving ample security for the same, and also to pay the costs that may be incurred in this court and the court of appeals, should the case go to that court. By coming into this suit, in which they were not necessary parties and, as these respondents are advised, were not proper parties, they have become actors and are amenable to the rule that they who seek equity must do equity. It is just not only that they should be required to pay what they owe to said company, but also the increased costs of this suit, and to furnish security ample to protect and indemnify all interested in the trust fund against loss to that fund by reason of the suspension of the proceedings instituted by the trustee to collect the assessments authorized by said decree of December, 1880, or by reason of loss by the prevention of further assessments now known to be necessary to complete said fund.

As to specification No. 12, objecting to the appointment of John Glenn as trustee because he is a resident of the State of Maryland, respondents respectfully say that the great majority in value, if not in number also, of the creditors are residents of Maryland; that said Glenn was the unanimous choice of all the creditors; that he gave bond in the penalty of $100,000 for the faithful performance of his duties as such trustee, with sureties qualifying to responsibility for $300,000; that he has so far fulfilled his duties with rare intelligence, diligence, and fidelity, to the entire satisfaction of the court and the creditors and to the dissatisfaction only of defaulting stockholders, upon whom the due exercise of the faculties fitting him for the office is their only cause of complaint against him, and that such complaint is only compliment and commendation; and that if the said three small Georgia stockholders or any other stockholders will only pay to the said trustee what is now or may hereafter by future calls become due to him by reason of assessments upon their unpaid subscriptions, these respondents hereby engage to release them from all obligations to pay anything more on said subscriptions so far as these respondents are concerned, and the receipt of the trustee for the same will constitute a full bar to any other or further claim for the same.

THE SAID DEMURRANTS AND
RESPONDENTS ABOVE STATED.

January 28, 1885.

97 Affidavit to the foregoing answer is hereby waived.

A. H. COX,
Sol. for Compl'ts.

Richmond, January 21, 1885.

Original and Full Report of the Business Committee, Referred to on pp. 97, 98 of the Printed Record and Filed as an Exhibit with Answer of the Creditors to Petition of Jennings and Others.

The business committee, having examined into the affairs of the company as well as the limited time at their disposal has enabled them to do, beg to make the following report:

No. of shares subscribed for	43,556	
On which calls have been made of 20 per cent., amounting to	$871,120 00	
Am't actually paid on said calls	$534,748 00	cash
In notes of the parties	54,436 00	
Making	$589,184 00	
Calls in arrear amount to	281,936 00	
	$871,120 00	

Nothing whatever has been paid on	557	shares
The directors agreed to consolidate	3,512	"
No. shares on which calls have been paid	39,487	"
	43,556	"

No. shares on which all calls have been paid	15,188
" " in arrear	28,368
	43,556

Indebtedness of Co. as reported by its officers	$273,000 00

But the committee think it safe to assume them at	$300,000 00
Further debts to accrue by Nov. 1st, 1866	25,000 00
Estimated loss on leases and contracts	25,000 00
	$350,000 00

98 The property of the Co. cost, according to books $212,000 00
Other assets, representing 55,000 00
$267,000 00
Assumed to produce $100,000 00

The committee are informed by counsel that the company has no power to reduce the capital stock below one-third of the $5,000,000 required by the charter, say $1,667,000. They are further informed by counsel that the par value of each share cannot be made less than $100, as prescribed in the charter.

In order, therefore, to consolidate the stock the committee recommend that the 43,556 of subscribed shares be reduced to one-fourth that number, say 10,889, to be accomplished by the surrender of four shares, on which $25 each has been paid, and the issue in lieu thereof of one share of full-paid stock of one hundred dollars. In order to effect this and to raise a fund in addition to the assets now in the hands of assignees, to pay the entire indebtedness of the company, a further call of $5 per share on the 43,556 subscribed shares be at once made, making $25 in all.

The above proposition would, however, reduce the amount of stock below the one-third required by the charter. The committee therefore recommend that six hundred thousand dollars of preferred stock, bearing 8 per cent. interest, be issued in six thousand shares of one hundred dollars each, to be sold at not less than par. This will increase the stock to the amount required by the charter and provide means for the successful prosecution of the company's operations.

They further recommend that a committee of five, consisting of one director, three stockholders, or proxy, not directors, and the superintendent, be appointed to negotiate for the sale of the preferred stock at once. Failing in the disposal of the preferred stock, the president and board of directors will at once take such steps, by additional calls or otherwise, as may be necessary to enable the trustees to liquidate every just demand against the company and dissolve the corporation.

F. C. BARBER,
Chairman Bus. Committee.

Richmond, Va., October 10, 1866.

To the chairman of the meeting of stockholders of the National Express and Transportation Company.

99 *Depositions Filed in Open Court February* 19, 1885.

In the Circuit Court of the County of Henrico.

GLENN'S ADM'R and Others
v.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

In the matter of the petition of Thomas J. Jennings, Goode Bryan, and Charles B. Purcell.

To the said Thomas J. Jennings, Goode Bryan, and Charles B. Purcell.

GENTLEMEN: Please take notice that on Saturday, the 31st of

January, 1885, we shall, at the office of O. G. Kean, Esq., Goddin building, at the corner of 11th and Bank streets, in the city of Richmond, between the hours of 9 a. m. and 5 p. m., proceed to take the depositions of Edward H. Fitzhugh, P. P. Winston, L. P. Winston, and others, to be read as evidence in our favor on the hearing of the above-entitled matter, and that if from any cause the taking of the said depositions should not be commenced on that day, or, if commenced, not completed, the same will be continued from day to day and from time to time at the same place and between the same hours until completed.

Respectfully yours,

THE COMPLAINANTS IN THIS SUIT,
CREDITORS, &c.,
By COUNSEL.

Richmond, January 29, 1885.

Executed January 29, 1885, by delivering to Joseph Christian, counsel for the within-named petitioners, a copy of the within notice.

LEWIS P. WINSTON,
She'ff City of Richmond.

In the Circuit Court of the County of Henrico.

GLENN'S ADM'R and Others
v.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

In the matter of the petition of Thomas J. Jennings, C. B. Purcell, and Goode Bryan.

100 To Thomas J. Jennings, C. B. Purcell, and Goode Bryan, Esqs.

GENTLEMEN: Please take notice that the depositions of Benjamin H. Berry, P. P. Winston, and L. P. Winston, taken by us at the office of O. G. Kean, Esq., in the Goddin building, cor. 11th and Bank streets, in the city of Richmond, Va., in pursuance of notice theretofore given you, have been kept open and will be kept open for re-examination and cross-examination of said witnesses until the 19th day of February, 1885. Should it be desired by you, said witnesses will be recalled and re-examined and every opportunity given you for cross-examination, or, at your option, they may be cross-examined upon their testimony already given. The notary is Conway Sands, Esq., cor. of said 11th and Bank streets, who will cause the witnesses to attend at any time you may appoint between this and the said 19th February, 1885.

Respectfully yours,

JOHN M. GLENN,
Adm'r, &c., of W. W. Glenn, Dec'd, and the Other Compl'nts, Creditors of said Defendant Company,
By CARRINGTON & FITZHUGH AND JOHN HOWARD, *Their Counsel.*

Richmond, February 14th, 1885.

STATE OF VIRGINIA, *City of Richmond,* } *sct:*

I, F. H. McGuire, a notary public in and for the city aforesaid, do certify that Edgar W. Carrington, of lawful age, this day made oath before me, in my said corporation, that on the 14th day of February, 1885, he delivered to Judge Joseph Christian, attorney and counsellor-at-law, a true copy of the above notice.

Given under my hand this 16th day of February, 1885.

F. H. McGUIRE, *N. P.*

The depositions of P. P. Winston, L. P. Winston, and others, taken before me, Conway R. Sands, a notary public for the city of Richmond, pursuant to notice hereto annexed, at the office of O. G. Kean, Esq., in the city of Richmond, on the 31st day of January, 1885, between the hours of 9 a. m. and 5 p. m., to be read as evidence in behalf of the complainants, creditors, &c., in the suit of Glenn's adm'r and others *v.* The National Express and Transportation Company and others, depending in the circuit court of Henrico county, Va., wherein Glenn's adm'r and others are
101 plaintiffs and The National Express and Transportation Company and others are defendants, in the matter of petition of Thomas J. Jennings and *als.*—John Howard, Esq., counsel for complainants in above-entitled suit and others, creditors of said company, whose claims were established by the decree of December 4th, 1880.

Mr. P. P. WINSTON, being duly sworn, deposes and says as follows:

1st Question by Mr. HOWARD: Please state your residence, age, and occupation.

Ans. I reside in the city of Richmond; I am fifty-six years old, and am deputy sheriff of the city of Richmond.

2d Ques. by do. How long have you been connected as an officer with the office of sheriff of the city of Richmond? Please state when your connection with that office commenced and what positions you have held therein.

Ans. My connection with the office commenced about 1846–'47 as deputy sheriff. I have been connected with the office ever since that time, except during the war and three years before the war, it being about seven years altogether that I was out of the office; the rest of the time I either held the office of deputy sheriff or of sheriff, and have personally executed the duties of the same. During a part of that time the sheriff of the city of Richmond and the county of Henrico was the same person, and he and his deputies executed all the duties of sheriff in all the courts alike in the city and county, except in the hustings court of the city of Richmond.

3d Ques. by do. During the time you have been connected with said office what has been the usage and practice or manner of serving writs in cases in which the sheriff was plaintiff by virtue of his office—*i. e.*, as adm'r or executor, C. T. A., suing in behalf of the estate? State to whom, in such cases, have the writs been directed and by whom executed.

Ans. Since 1865 the universal practice has been to direct writs to the sheriff of the city of Richmond, and they have been uniformly served on the defendants by the deputy sheriff, and my recollection is that that was the rule also before the war.

And further this deponent saith not.

P. P. WINSTON.

Mr. BENJAMIN H. BERRY, having been duly sworn, deposes and says as follows:

102 1st Question by Mr. HOWARD: Please state your name, age, residence, and occupation.

Ans. Benjamin H. Berry; I am thirty-nine years old; reside in the city of Richmond, and am clerk of the chancery court of the city of Richmond.

2d Ques. by do. How long have you been connected with the chancery court as clerk? And state if you have acted as clerk in other courts.

Ans. I have been clerk of said court ever since 1870; I qualified as clerk of the court in July, having been elected in May; I was clerk in other courts from 1863 up to that time.

3d Ques. by do. Please state what has been the usage, practice, or manner of directing and executing writs in the chancery court of the city of Richmond during the time you have been clerk thereof in cases in which the sheriff of the city of Richmond, by virtue of his office, has been plaintiff—*i. e.*, as adm'r or executor of deceased parties, suing on behalf of the decedent's estate; state to whom the writs in such cases are directed and by whom executed on the defendants.

Ans. They are directed to the sheriff of the city of Richmond and generally executed by his deputy. So far as I know, that has been the universal custom.

4th Ques. by do. Was or not such the usage and custom in other courts of the State in which you acted as clerk?

Ans. Yes, sir; it was the same custom. During the twenty-odd years in which I have been connected with clerks' offices that has been the universal custom.

5th Ques. by do. Look at the writ and service thereof, to be found on pages thirty-two and thirty-three of the printed and certified record in this cause, and state whether or not the writs there appearing to have been executed upon the National Express and Transportation Company was directed and executed in the usual way in cases in which the sheriff is plaintiff in the manner above stated.

Ans. I have examined the writ and am satisfied that it was directed and executed in the usual way.

And further this deponent saith not.

BENJ. H. BERRY.

LEWIS P. WINSTON, Esq., another witness, being duly sworn, deposes and says as follows:

1st Ques. by Mr. HOWARD: Please state your name, age, residence, and occupation.

Ans. Lewis P. Winston; I am twenty-nine years old; reside in the city of Richmond, and am at present sheriff of the city of Richmond.

2d Ques. by same. Please state how long you have been
103 connected with the office of sheriff in the city of Richmond, as sheriff or deputy.

Ans. Fifteen years; during which time I was deputy fourteen years and sheriff about one year. During the whole of this time, before I was elected sheriff, I was the principal deputy.

3d by do. Please state what has been the usage and practice during that time of directing and executing writs in cases in which the sheriff, by virtue of his office, has been personal representative, suing for the benefit of the estate of deceased persons. State to whom the writs have been directed and by whom they have been executed on the defendants.

Ans. Writs were universally directed from the chancery court of the city to the sheriff, and were executed by me, as deputy. That has always been and is now the custom. In such suits brought in my name my deputy executes the writs on the defendants; and I have always understood that was the previous custom in the office.

4th Ques. by do. Please look at pages thirty-two and thirty-three of the printed and certified record in this case at the writ there appearing to have been executed on the National Express and Transportation Company, and also inspect the original writ and return now shown you, and state whether or not the said writ was directed and executed in the manner above stated by you.

Answer. I have inspected the said writ and the return thereon, the original of which I now hold in my hand, and perceive and state that it was directed in the usual way and was executed by me on the said company.

5th Ques. by do. Please state whether or not you recollect to have executed personally that writ.

Ans. I distinctly recollect the fact. I made particular inquiries as to who were the officers of the said company, and the matters stated in the return are strictly true.

And further this deponent saith not.

LEWIS P. WINSTON.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, Conway R. Sands, a notary public for the city aforesaid, in the said State, do hereby certify that the foregoing depositions were taken and sworn to and subscribed before me at the time and place mentioned in the caption thereto; and I do further certify that the said depositions were kept open in conformity with the notice hereto attached until the 19th day of February, 1885.

Given under my hand this 19th day of February, 1885.

CONWAY R. SANDS, *N. P.*

Notary's fee for taking depositions, $5.

104 *Decree of March* 4, 1885, *and Opinion of Court.*

In the Circuit Court of Henrico County, Continued by Adjournment and Held for said County, March the 4th, 1885.

GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.
} In the Circuit Court of the County of Henrico.

This cause came on this day to be heard on the papers formerly read and upon the petition of Thomas J. Jennings, E. B. Purcell, and Goode Bryan, and the demurrer and answer thereto of the complainants and the joinder of the said petitioners in said demurrer (there being no replication to said answer), and upon exhibits and examinations of witnesses filed, and by consent of parties, by counsel, was set down for argument, and was argued by counsel.

On consideration whereof, for reasons expressed in writing, herewith filed and made part of the record, though not to be spread upon the order book, the court doth adjudge, order, and decree that the said petition be dismissed and that the complainants recover of the said petitioners their costs in the matter of the said petition expended; but this decree is to be without prejudice to any subsequent application of the petitioners or other stockholders to reopen the decree entered in this cause on the 14th day of December, 1880, so far as may be necessary to inquire into the validity of any of the debts against said company recognized in said decree; such application to set out sufficient reason to justify the court in reopening the decree for said purpose, and to be accompanied with a tender of adequate security to pay all costs awarded to any party and all damages sustained by any party by reason of such application, and in other respects to abide the judgment of this court.

And liberty is given said petitioners, or any other stockholders, to take such steps as they may be advised for requiring the surviving trustees, in the deed of trust in the proceedings mentioned, to render such further accounts as may be deemed proper, upon like terms as are above prescribed.

And the petitioners desiring to appeal from so much of this decree as dismisses their petition with costs, the court, on their motion, suspends that portion of this decree for twenty days from the date hereof, provided the said petitioners, or some one or more of them or some one for them, shall give bond, with good security, in the penalty of three thousand dollars, in the mode and with conditions prescribed by law.

105 GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.
} Opinion of Court.

This cause has been transferred to this court by order of the chancery court of Richmond of June 27th, 1884.

It comes before this court now upon the petition of Jennings and others, three citizens of Georgia, asking to set aside and rehear the decree of the chancery court of Richmond of December 14, 1880. That decree established the validity of the deed of trust of the defendant company of September 20, 1866; construed the deed as a conveyance of all the property of the company, including the unpaid subscriptions of stock; approved a report of its commissioner of the debts due by the corporation, and finding, in the absence of other property of the corporation, that it was necessary for the payment of these debts to resort to the stockholders for their unpaid subscriptions, substituting a trustee for the original trustees designated in the deed, and, assessing upon the stockholders a contribution of thirty per cent. of their subscription, ordered the trustee to collect the same by suit or otherwise.

The substantial justice of this decree, as to the greater part of the creditors against the corporation, and the necessity of resorting to the stockholders to pay them, has not been and cannot be made matter of controversy. It is idle to cite authorities to sustain the fundamental principle of corporation law, that the unpaid subscriptions of stockholders are debts due to the corporation out of which the creditors have a right to be paid.

The only substantial objections to this decree are the allegations that the indebtedness of the corporation is less than that reported by the commissioner and confirmed by the court, and that the assessment upon the stockholders made by the court is therefore too large.

If this indebtedness of the corporation be less than the commissioner reported, it does not necessarily follow that the decree was wrong in the assessment made upon the stockholders. It is abundantly apparent that some assessment upon the stockholders was necessary.

To the extent of every dollar of their unpaid subscriptions they were holders of funds to which creditors had a right to resort. The assessment upon all of them was designed to call in these funds ratably, so as to equalize between the stockholders the common burden. If the assessment decreed by the court yields too large a sum to satisfy creditors, the stockholders will reclaim their
106 over-payments, if there be any over-payment. Whatever the hardship or suffering of the stockholder in making it, the rights of the creditor are of superior dignity, and in the interest both of stockholder and of creditor it is better to have the assessment made at once abundantly adequate to discharge the debts of the corporation. Kennedy *v.* Gibson, 8 Wall., 505. It is now very questionable whether, viewing this record in the best light for the stockholders, the assessment ordered by the decree of December, 1880, will yield the sufficient sum, and it may be that a subsequent assessment will be necessary.

The petition in this case was allowed to be filed by the chancery court of Richmond April 11th, 1884. If this order had not been entered, and I were now called to consider the application to file this

petition against the objections of the plaintiffs, I do not think that the leave to file ought to be given.

The petitioners do not even ask to be admitted as parties to the cause. They do not even admit that they are stockholders in the company. The petitioners are residents of another State, and the enforcement of the decree of which they complain was contemplated by the decree to be had in another forum. Their language is carefully guarded, therefore, so as to reserve to themselves defences in the courts of Georgia which the courts of Virginia upon their own application to hear them might reject; but in despite of their guarded language they have voluntarily subjected themselves to the jurisdiction of this court, and, if no demurrer had been interposed and the petitioners had been required to reply to the answer and issue had been forced upon that, I would have been compelled to hold them to the jurisdiction of this court, and could not have dismissed them from the cause until, after enquiry before a commissioner and ascertainment of their liability, a decree could be entered against them, which would conclude all controversy as to them in the courts of Georgia.

But the demurrer has been interposed, and no replication to the answer has been entered, and in this condition of the pleadings the case, after elaborate and able argument, has been submitted to the court.

It was practically conceded in the argument that the stockholders were not necessary parties to the case, and that the decree complained of is conclusive against them when sued upon in other courts of this or any other State. If it had not been so conceded the well-considered judgment of the court of appeals of Maryland and the able and exhaustive opinion of Judge Alvey, concurred in by all of his brother judges, in Glenn *v.* Williams, 60 Md., 119, would relieve me of any necessity to extend this opinion upon this point.

This opinion of the Maryland court appears to have been accepted and its judgment followed in the United States court of Louis-
107 iana, Glenn, trustee, *v.* Soule, 22 Fed. Rep., 417, and of District of Columbia, in the case of Glenn, trustee, *v.* Busey, and in a State court of California.

But it is urged that the decree against the corporation was practically a decree by default, and that the stockholders who had no knowledge of the proceedings and no opportunity to protect their interests should now, in the same court which rendered the decree, be permitted to be heard.

It is insisted that the corporation was never properly before the court, and that the court was without jurisdiction to render the decree. If this be so, it is never too late for the court to retrace its steps, and in whatever manner the fact is brought to the attention of the court, whether by a party to the cause or the suggestion of any outsider either as *amicus curiæ* or otherwise, it is the duty of the court *ex mero motu* to rescind its action.

I am of opinion, however, that this corporation was properly before the court. Even if we were justified in considering the corporation as having expired or dissolved, the 31st sec., 56 ch., Code of

1873, continued its existence as long as might be necessary to enforce its liabilities and distribute its property among its creditors. The proceedings by or against it were required by the statute to be the same, whether it was a "living" or, as learned counsel for petitioners phrase it, a "going" corporation or an expired corporation.

Now, ch. 166, sec. 7, Code 1873, provides how process against a corporation must be executed. By the act of incorporation the city of Richmond was made the habitat of the principal office of the company. If the president of the company had been found here process could have been served upon him. In his absence it could have been served upon the cashier or treasurer, and if there were none such upon a director of the company. The act further requires, in order to render the service valid, that the return should show on whom and when the service was made, and that the persons so served were residents of the sheriff's bailiwick. Now, this process was served upon M. B. Poitiaux, as cashier, and upon Joseph R. Anderson, as director, and the officer's return shows that both of them were residents of the city of Richmond; that it was executed upon both of them in the city of Richmond, August 8, 1879, by delivering to each a copy of process, and that the president of the company was not a resident of Richmond. Both Mr. Poitiaux and Gen. Anderson appeared and answered, and, while they disclaimed right to answer officially, recognized in their answer the service upon them officially of the process in the cause. Now, if Mr. Poitiaux was the cashier or treasurer of the company, service upon him was sufficient. If he was not, there was no such officer of the company within the sheriff's bailiwick, and service upon a director was sufficient.

Gen. Anderson, in his answer, does not deny that he was a
108 director. He admits that he had been, but states his belief that he had resigned. This answer, however, is sufficient to throw upon the plaintiffs the burthen of showing that he was a director when the process was served. With that *onus* upon them, the evidence in the record is abundantly sufficient. Gen. Anderson appeared as director in the very last meeting of the directors which was ever held, and that meeting was subsequent to the last meeting of the stockholders. He could, therefore, never have divested himself of his official relation to the company.

As to the objection that the service of process was invalid because made by a deputy of Mr. Wright, who, as sheriff and administrator of Glenn, was plaintiff, I think it is entirely without merit. No objection of this character has ever, so far as I have heard, been made in Virginia before. It is a matter of every-day practice in every court in the Commonwealth, and has been from the earliest days of the State. The concurrence of professional opinion, both of the bar and the bench, through these many years, is alone sufficient to repel the idea that the practice had been in violation of law.

The summons, being merely serviceable process, might, at common law, well have been executed by the sheriff himself, though plaintiff in the suit, independently of our statute authorizing a summons to be served as a notice is served, which may be and is constantly

served by the plaintiff. See Sewell on Sheriff, 46 Law Library, 88, 89; Mayor, &c., *v.* Bubb, 1 Dowl. Practice Cases, 151; Mayor, &c., *v.* Williams, 17 E. C. L. (10 Moore), 266; Code 1873, ch. 166, § 5, § 2, § 6, ch. 163, § 1.

The corporation was then, in my opinion, undoubtedly before the court; but the answers of Poitiaux and Anderson made patent the fact that the corporation was not a going corporation, and I think that the attention of the learned chancellor ought to have been called at once to these answers and enquiry had as to the facts upon which the jurisdiction against the corporation was assailed; and when it did appear that this dormant, if not dead, corporation was before the court by service of process upon officers who disclaimed right to represent it and refused to represent it, and that, being before the court, creditors are asserting their right to have ascertained and determined the large amount of its asserted indebtedness, and that the only possible means of payment of their debts was by assessments on hundreds of absent stockholders, I think the court ought to have required the officers of the company, upon whom process had been served, to retain counsel to protect the interest of the company and its absent stockholders, with a pledge of compensation to counsel out of the assessments to be made upon these stockholders.

This, however, was not done, and the case proceeded to
109 hearing before commissioner and court without the appearance at any stage of the investigation of any party to represent the interests of the stockholders, and resulted in the ascertainment of the decree of December, 1880, of an indebtedness of some $500,000, and the necessity of a call upon stockholders scattered throughout twenty or more States for 30 per cent. of a subscription made fifteen years before the decree, and to which the mass of these stockholders had reason to believe that all obligations, if any, had been extinguished years ago.

There is an apparently imposing equity in the application of these petitioners. But this apparent equity depends upon the reasonable suggestions in view of all this record of practical injury. There are equities on the other side. The creditors of this company, whoever they may be or however large their debts, have equities very superior to those of her stockholders. The suggestion that as to any of the debts the statute of limitation could be pleaded or ought to be pleaded is without any merit. The stockholders were permitted by the company to retain the greater part of their subscriptions, but they retained it subject to call when needed to pay creditors of the company. As part of the property of the company, these unpaid subscriptions were conveyed to the original trustees for the benefit of creditors, and the substituted trustee represents the beneficiaries of that dedication, or, in other words, all of the creditors of the company. The conveyance of the company made these subscriptions a trust fund, and as to no creditor can the statute of limitations be pleaded in favor of this trust fund. Upon this familiar principle I hardly think it necessary to cite authorities, and content myself with referring to two Virgina cases—

Smith *v.* R. R. Co., 33 Grat., 617; Bowie *v.* Poor School, 75 Va., 300.

Outside of this suggestion of the statute of limitations, neither in the petition nor the argument has there been any suggestion of doubt as to the validity of the claims against the company reported by the commissioner and confirmed by the court in its decree, except as to a single debt.

This is a very large claim, however, and if any of the stockholders desire to have the decree reopened for new inquiry as to its validity, and can in a subsequent petition show sufficient reasons to justify apprehension that injustice has been done in recognizing this debt, the decree now to be entered will reserve the right to make the new enquiry upon proper terms. I must say, however, that from my examination of this record, in view of the objections to the debt assigned by counsel in argument, I believe the new enquiry will result in re-establishing the claim and prove of no practical benefit to the stockholders.

It was further urged in support of the petition that the
110 original trustees had not been required to account and have not accounted. This objection appears to have arisen from a partial examination of the record.

At the last term of this court the surviving trustees were required to account before one of the commissioners of the court, and Commissioner Leake's report under that order was presented and confirmed, showing an indebtedness of the trust to both of the surviving trustees.

If, however, any probable injustice was done to the stockholders in this settlement of the trustees' account while the corporation was practically without representation, opportunity will be afforded to reopen the accounts; but in reopening these accounts either to surcharge and falsify the trustees' accounts or to assail the validity of any debt which has been recognized by the court it is only fair that the stockholders at whose instance it is done should give security to pay any costs unnecessarily sustained by the trustees or creditors in making such further enquiry.

The amount of the indebtedness of the company recognized in the decree of December, 1880, is very large, but quite one-half of it is now the cumulation of interest upon debts which have been unpaid since 1866–'67. The principal of the indebtedness recognized by the court, when compared with the estimated indebtedness of the company by the stockholders and directors in their last official action, is very suggestive that the stockholders have suffered no wrong in the accounts taken in the cause.

From any presentation in the petition or in the argument of counsel in support of it, I cannot now see that there has been any probable injustice done to the stockholders in the ascertainment of the debts due by the company, but if there has been any the court will be held open for enquiry upon any proper showing of the necessity for such enquiry at any time before the debts are paid.

Leave to file further petitions contesting any of these debts and to assert any liability of the trustees will, therefore, be reserved in

the decree for these petitioners or other stockholders, conditioned upon the assignment of adequate reasons and tender of security to abide the judgment of the court.

But no petition will be entertained to arrest or delay the enforcement of the decree of December, 1880, so far as it requires the substituted trustee to collect by suit or otherwise the assessment upon the stockholders of 30 per cent. of their subscription of stock. If that portion of the decree could be suspended or arrested, I believe that the ultimate result would be of necessity to impose upon the now solvent stockholders the payment of an increased assessment to meet the unnecessary costs of protracted litigation and the cumulation of interest upon indisputable debts of the company. The
principal of these debts was estimated at the meeting of the
111 stockholders held in this city on the 10th of October, 1866,
to be, as of the 1st November, 1866, some $350,000. The decree recognizes a principal of less than $300,000. The monthly interest upon, say, only $250,000 is some $1,250, and has to be paid sooner or later by these solvent stockholders. In their interest, therefore, not less than in the interest of the creditors, I am of opinion that the decree for the collection of the assessment should be promptly and vigorously enforced.

Petition of John Glenn, Trustee. Filed March 25th, 1885.

In the Circuit Court of Henrico County.

GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

To the Hon. B. R. Wellford, Jr., judge of said court:

The petition of John Glenn, trustee, respectfully states that all of the copies of the record heretofore printed and which embraced all of the original and direct proceedings down to and including the decree of January 3d, 1881, have been exhausted, and it has become necessary in the prosecution of suits under the decree of December 14th, 1880, that additional copies should be printed. Since the said 3d day of January, 1881, however, certain voluminous collateral and immaterial proceedings have been had in the case, at the instance of various stockholders and others, which, with the exhibits filed, have increased the record to an enormous bulk without in any manner affecting the said original and direct proceedings.

If these subsequent collateral matters are to be considered a part of the record the copying and printing of the same would greatly enlarge the bulk and multiply the costs in the premises, and in any of the numerous suits which your petitioner has brought or may bring against stockholders in the different States an appeal on either side would necessitate the incurrence of useless costs to a degree amounting to oppression, inasmuch as the said extraneous matter would be wholly immaterial and unnecessary for the prosecution or the defence of such suits. The costs of said litigation in the different States are already very great and are continually increasing. It

is the obvious interest of the stockholders themselves, by whom these costs will ultimately be paid, that the same should be diminished as far as practicable.

The said collateral proceedings embrace the petition of J. J. A. Trotter, a stockholder, tendered to be filed on the 13th of October, 1881; the petition of John E. Hurst and others, filed on the 14th
112 day of May, 1883, and the petition of Thomas L. Farish and others, filed on the — day of July, 1883; and the joint and several answers of the Baltimore and Ohio Railroad Company, the Bank of Commerce, W. W. Glenn's adm'r, and others to the said several petitions (the said several answers having been filed on behalf of said respondents and all other creditors of the defendant company); also numerous and voluminous exhibits and depositions filed with the said petitions and with said answers as parts thereof. All of the said collateral proceedings resulted in the decree of July 21st, 1883, authorizing your petitioner, the trustee, within six months from the date thereof, upon the payment to him, by any of the subscribers or persons liable on the stock of this company, of twenty-five per cent. of the original amount of subscription, with certain interest and costs, to give an acquittance in discharge of such liability, which decree may be found as entered on the said 21st day of July, 1883, in the records of this case.

Your petitioner has duly reported to the court from time to time his action under the said decree, as will appear from the files of said record. The said reports are also voluminous and immaterial in any proceedings against other stockholders.

Your petitioner further shows that on the 11th day of April, 1884, another petition was filed by Thomas J. Jennings, Goode Bryan, and Charles B. Purcell of a character similar to those above mentioned, to which the Baltimore and Ohio Railroad Company, the Bank of Commerce, Glenn's administrator, and other creditors filed a demurrer and a joint and several answer and exhibits and the depositions of witnesses.

The object of each and all the petitions above named was to obtain a rehearing of the said decree of the 14th day of December, 1880, and to set the same aside.

The record of the court in this case shows that on the 9th day of December, 1884, the said several petitions of Trotter and of Hurst and others and of Farish and others were dismissed, and your petitioner was directed to proceed to execute the said decree of December 14th, 1880, as if the said order of July 21st, 1883, had never been entered, and that the matter of the said petition of said Jennings, Bryan, and Purcell having been fully argued and heard the said petition was, on the 4th day of March, 1885, dismissed with costs.

In addition to the foregoing matters, which are collateral and immaterial as aforesaid, various reports have been filed by your petitioner of his transaction as trustee, and various reports have also been filed by commissioners of this court auditing said reports and in reference to the details of the administration of the said trust, which reports are wholly immaterial for the purposes of prosecuting

or defending any suit or suits against stockholders authorized by the said decree of December 14, 1880.

113 Your petitioner is advised that, for the said purposes, the only additions to the record heretofore printed, which closed with the decree of January 3d, 1881, are copies of the orders and decrees since entered; as they will show all of the subsequent action of the chancery court of the city of Richmond, ending with the order of that court, of the 27th day of June, 1884, removing this cause to this court and all of the subsequent action of this court in this cause to this date.

Your petitioner therefore prays that your honor will enter an order directing the clerk of this court, in making out a copy of so much of the record in this case as may be required by your petitioner for showing his authority to sue the stockholders of the defendant company for the assessment of thirty per cent. of their stock as prescribed by the said decree of December 14, 1880, to omit the matters and things specified in the foregoing petition as immaterial and unnecessary in any litigation in respect to the said assessment.

If it should be deemed advisable to insert any of said petitions of stockholders and the answer and the exhibits and evidence filed, the matter of said last petition, known as the Georgia petition, would seem to be sufficient, as being the last and as indicating the character of all, and furnishing the occasion for the only adjudication upon the matter of a rehearing, namely, the late opinion and decree of this court reviewing the original and direct proceedings of the chancery court of the city of Richmond, resulting in said decrees of the 14th of December, 1880, and 3d January, 1881, which constitute the authority of your petitioner to collect the said assessment.

In addition to the said petitions, proceedings thereon, and reports aforesaid, petitions have been filed by several creditors and others having reference to interests in the fund under the control of the court upon which proceedings also have been had; all of which are entirely extraneous and immaterial, as aforesaid, and it is prayed that these also may be omitted, as aforesaid.

JOHN GLENN, *Trustee*,
By COUNSEL.

CARRINGTON & FITZHUGH,
JOHN HOWARD, } *P. Q.*

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for said county, March 25, 1885.

GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

114 This cause came on this day again to be heard on the papers formerly read and the petition of John Glenn, trustee, this day filed, and was argued by counsel; on consideration whereof

the court, being of opinion that the prayer of said petition is reasonable and proper and should be granted, doth adjudge, order, and decree that the clerk of this court, in making out a copy of so much of the record in this cause as may be required by John Glenn, trustee, for showing his authority to sue the stockholders of the defendant company for the assessment of thirty per cent. of their stock, as prescribed by the decree of December 14th, 1880, heretofore entered in this cause, may omit therefrom the petition of J. J. A. Trotter, the petition of John E. Hurst and others, and the petition of Thos. L. Farish and others, the answers thereto, and exhibits and depositions with said petitions and answers respectively filed; also the reports of John Glenn, trustee, of his action under the decree of July 21st, 1883; also the petition of Jennings, Bryan, and Purcell, the demurrer and answer thereto and exhibits therewith, and the depositions of witnesses referring to that petition; also the various reports of said John Glenn of his transactions as trustee and the various reports filed by master commissioner of this court, auditing the said reports and in reference to the details of the administration of the said trust and also the petitions of creditors and others in reference to interests in the fund under the control of the court, referred to in said petition of John Glenn, trustee, this day filed, and the proceedings had thereon; the court being of opinion and so deciding that the several matters and things above specified are immaterial and have no bearing upon the validity of the said decrees of the 14th day of December, 1880, and the 3d day of January, 1881, establishing the right and authority of the said John Glenn, trustee, to collect said assessment of thirty per cent. of the unpaid subscriptions to the capital stock of the defendant company, which decrees still remain in full force as when first entered.

And at another day, to wit: *

At a circuit court of the county of Henrico, continued by adjournment and held for the said county, December 13th, 1884.

GLENN'S ADMINISTRATOR
vs.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others. } In Chancery.

115 VIRGINIA:

In the Circuit Court of the County of Henrico, December 13th, 1884.

This cause came on this day to be again heard on the papers formerly read and on the report of Commissioner Wm. J. Leake, dated on the 5th day of November, 1884, and filed in the office of this court on November 26th, 1884, which report was made pursuant to decrees of the chancery court of the city of Richmond (of which court said Leake is one of the commissioners), rendered on January 22d, 1884, February 9th, 1884, and March 8th, 1884, and

* This decree was inadvertently omitted at its proper place, namely, at p. 210, after the decree of Dec. 9, 1884.

to which reports no exception had been taken, and on the various accounts marked from No. 1 to No. 8, inclusive, and "Old trustees, account," and the various depositions and exhibits returned therewith, and on the reports of John Glenn, trustee, showing a settlement of his accounts from 13th August, 1883, to Jan'y 21st, 1884, and from that date to Octo. 8th, 1884, which accounts have been audited and approved by said Commissioner Leake, pursuant to the decree of Dec. 14th, 1880, and was argued by counsel; on consideration whereof the court doth approve and confirm the said report of Commissioner W. J. Leake of date Nov'r 5th, 1884, and all of the said accounts returned therewith, except so far as may be hereinafter expressly otherwise provided; and the court being of opinion that the fund now under its control, and which has arisen from and is the fruit of the compromise decree of July 21st, 1883, should be distributed equitably amongst all the creditors of the defendant company, according to the scheme therefor reported by Commissioner Leake, and being also of opinion that the creditors of the defendant company (other than John J. Kelly, as to whom special mention will be hereinafter made) who are alsostockholders therein, and who are still in default in payment of the assessment made by the court upon their shares, a list of whom is filed by Commissioner Leake as account No. 8, should not receive their dividends for the present, and in order to carry out the said equitable distribution of said fund, the court doth adjudge, order, and decree that the following persons, or Charles Marshall and John Howard, their counsel of record, have leave to check on the Planters' National Bank of Richmond, on an extract from this decree, for the following sums, on account of their debts, against the National Express & Transportation Company, as reported by Commissioner Leake—that is to say:

First. Debts due officers and employees:

(See account No. 2 with Commissioner Leake's report.)

116	No. 1	Gardner T. Getty, for the sum of	$34 98
	2	Arthur Shaff for	70 84
No.	3	L. R. Smoot for	309 01
	4	J. T. M. Barnes for	137 32
	5	Gen. Joseph E. Johnson (to be checked for by Rob't Stiles, his attorney of record) for	975 29
	6	Richard T. Allison for	70 01
	7	S. D. Childs for	29 37
	8	John Biddle for	19 58
	9	Oscar T. Keeler for	486 67
	10	M. W. Hutcheson for	137 10
	11	Charles W. Field for	143 37
	12	F. E. Marks for	83 98
	13	R. A. Jeffrey for	10 96
	14	Floyd McCulloch for	22 84
	15	S. Downey for	36 77
	16	S. F. Leps for	15 86
	17	James Du P. Fenton for	39 17
	18	S. E. Poor for	31 33

	18	J. W. Houck for	$15 27
	20	John G. Justice for	50 92
	21	Thomas K. Davis for	36 40
	22	D. S. Ryan for	23 89
	23	C. D. B. Webster for	32 51
	24	W. H. Glenn for	29 37
	25	E. Winchester for	27 16
	26	J. J. Graham for	31 33
	27	J. L. Hawk for	18 73
	28	R. C. Kinkead for	43 39
	29	Sherman Bailey for	13 70
	30	Earhart Bumans for	15 66
	31	John Murphy for	7 96
	32	F. W. Winchester for	9 79
	33	William Grimes for	15 66
	34	E. Shaffer for	19 58
	35	G. H. Swift for	5 87
	36	H. M. Cottingham for	229 42
	37	J. H. McDade for	39 17
	38	F. A. B. Jennings for	22 19
	39	R. W. Atwell for	29 37
	40	P. S. Johnson for	42 43
	41	R. M. Demere for	37 21
	42	H. C. Grubb for	51 57
	43	F. Shackelford for	21 80
	44	A. H. Contes for	11 75
	45	J. H. Nichols for	35 49
	46	C. M. Davis for	2 62
117	47	W. M. Keblinger for	37 41
	48	W. J. Keblinger for	39 17
No.	49	J. L. Brode for	52 55
	50	Edwin W. Wade for	14 75
	51	L. H. Fitch for	14 47
	53	D. T. Richards for	19 58
	54	W. S. Walker for	29 37
	55	R. Hendricks for	97 93
	56	M. G. Farrh for	50 53
	57	A. Cudworth for	29 87
	58	S. Wiltbank for	233 43
	59	C. J. Wiltbank for	111 84
	60	Wm. Wyman for	52 98
	61	F. Dougherty for	49 84
	62	Thomas P. Bacon for	94 35
	63	Wm. C. Ford for	35 29
	64	A. T. Lavalette for	5 48
	65	C. C. Thompson for	23 50
	66	David Buest for	23 50
	67	H. D. Basler for	8 44
	68	Benjamin Flood for	6 88
	69	Edward Beans for	15 01
	70	H. Montgomery for	4 70

	71	B. W. Oakman for	10 00
	72	John H. Maxwell for	3 72
	73	James Millman for	4 12
	74	Fred. Nagle for	7 95
	75	H. B. & A. Taylor for	39 17
	76	A. A. Laws for	13 70
	77	F. A. Goddard for	10 94
	78	Louis Green for	31 33
	79	Hollingsworth Warfield for	2,025 82
	80	L. Green for	43 95
	81	Rudolph Oehl for	34 60
	82	Daniel Seaton for	45 04
	83	John Wakins for	8 22
	85	W. H. C. Bayly for	24 48
	86	Stephin Cremin for	12 53
	87	George Bishop for	11 75
	88	P. B. Berkeley for	44 65
	90	Milton Ball for	45 04
	91	Henry Vaughan for	10 00
	92	George Bond for	22 34
	93	Andrew O'Meara for	17 85
	94	James Hood for	9 62
	95	W. H. Tibals for	13 58
	96	Edward McGeehan for	22 65
118	97	F. Grill for	7 54
	98	Jacob Arnold for	5 07
No.	99	John Manly for	9 23
	100	Thomas McCullough for	9 79
	101	Thomas Burns for	9 79
	102	A. Boyce for	10 96
	103	F. Craig for	4 22
	104	J. Schleiffer for	3 11
	105	W. F. Anderson for	6 85
	106	George McAllister for	7 24
	107	S. Bishop for	4 30
	108	Martin Clark for	36 32
	109	George Clark for	24 67
	110	J. A. Pierce for	60 93
	111	W. H. Glancote for	14 20
	112	James T. Ball	5 87
	113	G. C. Taliaferro for	29 37
	114	C. M. Davis for	28 03
	115	C. Yeungling for	123 37
	116	Thos. Dobbins for	29 37
	117	W. H. Gordon for	4 89
	118	R. A. Crawley for	64 63
	119	Edward L. Clark for	22 02
	120	A. N. Stewart for	47 20
	121	Benj. P. Grymes for	23 50
	122	W. L. Keller for	55 61
	123	Geo. M. Walters for	37 21

124	A. J. Smith for	47 00
126	Thomas Cook for	84 02
127	J. L. Brodie (this to be checked for), by Pegram & Stringfellow, his att'ys, for	53 38
128	George A. Smith (this to be checked for), by Christian & Christian, his att'ys, for	239 83
129	M. B. Porteaux for	115 22
130	J. P. McCorkle for	99 01
131	Philip Stockton for	178 98
132	A. B. Johnston for	162 82
133	John J. Kelly, by Rob't Stiles, his counsel, for	940 54
	Making in the aggregate the sum of	$9,744 69

To be checked for by the creditors mentioned in said account No. 1, the dividends of E. W. Anderson (No. 52, amounting to $19.58), M. C. Y. Barry (No. 84, amounting to $54.54), G. A. Schwartzman (No. 88, amounting to $17.18), and H. Heth (No. 125, amounting to $146.37), being retained under the control of the court until
119 they shall have paid their assessments on their stock or shown cause against such payment, making a total of $237.67 thus retained.

And in like manner the following parties shall have leave to check on said Planters' National Bank of Richmond for the dividends allowed them on their debts, as set out in the "supplement to account No. 2," as returned by Commissioner Leake, to wit:

134	C. Raborg, or Charles Marshall and John Howard, his counsel, for the sum of	$110 54
135	B. F. Corr, or the same counsel, for	9 35
136	E. P. Reeve, assignee, or the same counsel, for	45 80
137	Isaac E. H. DeGroff & Co., or the same counsel, for	331 42
138	W. H. Gover, or the same counsel, for	50 88
139	J. R. Braitwaite, or the same counsel, for	229 48
	Making an aggregate of	$777 47

To be checked for by the creditors named in said "supplement to account No. 2."

And the court doth further adjudge, order, and decree that the following corporations, through their proper officers or Charles Marshall and John Howard, their counsel of record, do check on said Planters' National Bank of Richmond for the following sums as the dividends due them on their debts against the defendant company, according to account No. 3, with Commissioner Leake's said report, to wit:

1	The Baltimore and Ohio Railroad Co. for	$16,451 03
2	Bank of Commerce, Baltimore, for	6,600 67
	Making an aggregate of	$23,051 70

To be checked for under said account No. 3 with said report.

And the court doth further adjudge, order, and decree that the following corporations, or Charles Marshall and John Howard, their counsel of record, do in like manner check on said bank for the following sums as the dividends due them on their debts against the defendant company, according to account No. 4, with Commissioner Leake's report, to wit:

1	Philadelphia, Wilmington and Baltimore Railroad Co. for	$1,346 08
2	Wilmington and Weldon Railroad Co. for	109 34
120 3	Northeastern Railroad Co. for	324 42
4	Charlotte, Columbia and Augusta Railroad Co. for	85 33
5	Richmond and Danville Railroad Co. for	226 60
	Making an aggregate of	$2,091 77

To be checked for under said account No. 4 with said report.

And the court being of opinion that the debts mentioned in account No. 1, returned with the said report, should be paid in full, all of said debts being for unpaid expenses of executing this trust, the court doth adjudge, order, and decree that the following parties have leave to check on the Planter's National Bank of Richmond for the following sums, in full of the debts reported as due them in said account No. 1, with Commissioner Leake's report, viz:

1	Page & Maury for the sum of	$828 00
2 and 3	John J. Kelly (Robert Stiles, his counsel) for	515 24
4	John Blair Hoge for	1,883 14
5	Burtin N. Harrison for	250 00

Making an aggregate sum of $3,476.38 to be checked for by said creditor named in said account No. 1, with said report.

And the court doth further adjudge, order, and decree that the following persons and corporations or Charles Marshall and John Howard, their counsel (except in cases where other counsel are expressly named, in which case then such counsel so named), shall have leave to check on said Planter's National Bank of Richmond, on an extract from this decree, for the following sums, in payment of the dividends reported due to them by account No. 5 returned with Commissioner Leake's said report, viz:

No. 1	John M. Glenn, adm'r *d. b. n.* of W. W. Glenn, for	$7,458 90
2	Francis Murray, for use of John R. Terry, for	2,715 25
3	Henry M. Bash, trustee, for the sum of	16,359 11
4	Luke H. Miller for	465 58
5	Fulton & Walke for	103 09
6	Robert Higgins for	182 21
7	Geo. McMaster for	144 13

	8	Pennsylvania Co. for insurance on lives and granting annuities trustee under the will of Sarah V. Syckel for	249 66
	9	Philadelphia, Wilmington & Baltimore R. R. Company for	697 74
121	10	Louis Stix & Co. for	97 99
	11	Wilmington & Weldon R. R. Co. for	86 09
	12	Richmond, Fredericksburg & P. R. R. Co. for	1,051 65
	14	Potomac Ferry Co. for	57 14
	15	South Carolina R. R. Co. for	827 73
	16	Charlotte, Columbia & Augusta R. R. Co. for	131 15
	17	Baltimore Steam Packet Co. for	68 15
	18	Orange & Alexandria R. R. Co. for	615 53
	19	Franklin Harrison for	28 16
	20	Andrew J. Joyce & Co. for	21 97
	21	"National Intelligencer" for	23 92
	22	E. R. Cunningham for	2 47
	23	H. P. Gilbert & Co. for	2 33
	24	"Publisher of Chronicle" for	50 07
	26	J. W. Naini & Bro. for	12 56
	27	Thos. Ware and Thos. Kelly for	6 41
	28	Palmer & Sly for	8 25
	29	Jas. S. Tapham for	5 69
	30	R. P. Buford for	3 93
	31	T. Titcomb for	1 41
	32	Henry St. Paul & Co. for	4 85
	33	James Couning for	9 97
	34	Edward Shloss for	44 26
	35	Petty & Sawyer for	123 24
	36	"Mobile Daily Tribune" for	6 02
	37	"Advertiser & Register" for	36 12
	38	Young & Words for	385 36
	39	Sims & Hamilton for	6 41
	40	C. M. McMullan for	1 08
	41	Berger & Hoffman for	1 68
	42	Sperdth & Indeinden for	2 81
	43	J. C. Orr & Co. for	1 17
	44	Walters & Knift for	2 33
	45	J. H. Logan & Co. for	0 19
	46	Bushfield, Wallace & Co. for	0 21
	47	Hamilton & Nagle for	0 38
	48	"Wheeling Intelligencer" for	8 09
	49	"Wheeling Register" for	6 79
	51	Atlantic and N. C. R. R. Co. for	101 28
	53	C. W. Starbuck & Co. for	5 82
	54	Fitch & Bro. for	3 30
	55	D. McFarland for	1 94
	56	J. W. Newman for	1 16
	57	E. Raine for	0 38
	58	Brown & Davis for	3 72
	59	Sam'l Blair & Co. for	5 16

	60	F. E. Suire & Co. for	2 68
122	61	C. B. Prather & Co. for	2 08
	62	Maguire & Co. for	1 20
No.	63	Andersen & McFarland for	2 29
	64	Wm. Huddart & Co. for	0 58
	65	J. B. Shroder for	0 72
	66	H. G. Strobel for	0 96
	67	Western Union Telegraph Co. for	28 91
	68	John M. Owen for	1 64
	69	Smith, Hawley & Co. for	6 74
	70	J. Black for	3 21
	71	Capatnus Shaffer for	1 20
	72	R. B. Smith for	7 63
	73	Peter Hoffman for	1 70
	75	P. Doherty for	3 86
	76	John Taylor for	1 88
	77	John Dean for	4 33
	78	Hunter & Gammell for	67 22
	79	J. T. Jenkins & Co. for	3 20
	80	C. W. & W. R. J. Long & Billups for	11 45
	81	J. J. Ford for	10 02
	82	Ogletree & Grubbs for	10 16
	83	S. S. Herman Livingston for	12 97
	84	J. A. Witherspoon for	12 91
	85	Town of Athens, Ga., for	4 24
	86	Mrs. C. A. Johnson for	60 69
	87	E. R. Hodgson & Bro. for	4 43
	88	Nicholson, Moss & Hutchinson for	14 45
	89	James Bond for	26 01
	90	Stockton & Co. for	18 66
	91	F. Arnold & Co. for	25 19
	92	G. A. Mercer for	4 80
	93	Rozwell King for	19 29
	94	Alabama & Florida R. R. Co. for	41 40
	95	Mobile & Great Northern R. R. Co. for	30 02
	96	Selma & Meridian R. R. Co. for	33 70
	97	J. J. Terrell for	56 06
	98	J. B. Rhea for	7 88
	99	Margaret W. Day for	52 98
	100	Richmond & Danville R. R. Co. for	446 01
	101	Va. Central R. R. Co. for	379 29
	102	Richmond & Petersburg R. R. Co. for	67 69
	103	Petersburg R. R. Co. for	78 39
	104	Richmond "Dispatch" for	32 57
	105	Richmond "Times" for	14 45
	106	Richmond "Enquirer" for	23 33
	107	Va. Free Press (Gallagher & Co.) for	3 85
	108	Winchester "Times" for	2 30
123	109	Winchester "News" for	1 93
	110	The Commonwealth of Virginia for	99 56
No.	111	City of Richmond for	192 68

112	Warwick & Barkesdale for	10 50
113	H. K. Douglass for	1 93
114	J. B. Taylor for	0 94
115	Merrin & Simpkins for	1 93
116	L. A. Elliott for	18 21
117	Benton H. Martin for	22 50
118	N. W. Belcher & Co. for	38 54
119	Stephen Lane for	49 14
120	H. Danford for	1 73
121	Abernathy & Co. for	17 80
122	E. & H. Anthony & Co. for	68 48
123	Thomas Chalmers for	23 60
124	A. M. Hays & Co. for	6 74
125	T. Franks & Co. for	23 79
126	Gordon & Slater for	1 88
127	Richardson & Co. for	4 39
128	Joseph Schneider for	9 61
129	R. Ibbotson, pres., &c., for	36 83
130	D. Appleton & Co. for	11 12
131	I. H. Foote for	19 26
132	E. J. Houseman for	2 72
133	S. D. Easterly for	17 98
134	W. S. De Saussure for	57 80
135	Hiram Harris, for	75 84
136	Cameron, Barclay & Co. for	7 25
137	Canstein & Jacobs for	3 39
138	Geo. D. Ladd & Co. for	15 45
139	Sawner & Ferguson for	16 11
140	C. D. Frank for	1 22
141	Wm. Brookbank for	12 34
142	Evans & Cogswell for	57 80
143	Benj. M. Innes for	4 32
144	Oglesby & Hoge for	14 78
145	James M. Cooper for	9 48
146	McCandlass & Smith for	2 75
147	Tucker & Sapman for	124 80
148	Weinstein & Bro. for	4 63
149	McCall & Monteith for	5 72
150	Fulton & Wilkes for	11 77
151	Philip L. Justice for	17 42
152	Andrew Johann & Co. for	0 96
153	C. L. Cadwallader for	25 58
154	Warner & Co. for	7 72
155	E. Kalterhaus for	5 35
124 156	James J. Martin for	54 38
157	William Mann for	7 91
No. 158	R. McClure for	9 62
159	James B. Smith & Co. for	31 92
160	Tryon, Bros. & Co. for	49 13
161	L. Bonaffon for	53 78
162	Powers & Weightman for	25 52

163	Boughman, Thomas & Co. for	2 36
164	Thomas B. Eaton & Co. for	0 56
165	Dickinson & Robelen for	9 66
166	W. A. Wisdom for	48
167	Underwood & Connor for	2 94
168	J. P. Smith for	3 51
169	Wm. McCauley for	4 81
170	Williamson & Co. for	34 71
171	C. H. & M. House for	17 33
172	Baltimore Gas-Light Co. for	22 23
173	Herman Bom for	6 22
174	Adam Kahler for	17 71
175	Gibson & Kirk for	7 12
176	Baltimore Sun for	5 50
177	Henry Roth for	4 56
178	Bibb & Co. for	38
179	Fred'k Oelmann for	2 85
181	Burton & Irving for	6 00
182	Andrews & Thompson for	3 43
183	George Brown for	7 88
185	Hodges Brothers for	7 12
186	Cushings & Bayly for	6 10
187	Schwardtman & Co. for	5 70
188	S. S. Mann for	22 42
189	H. Frank & Co. for	4 65
190	Mrs. S. C. Pickett for	3 90
191	C. E. Needles for	1 58
192	E. Whitman & Sons for	1 90
193	J. H. Walze for	7 60
194	McDowell, Robinson & Co. for	30 40
195	John T. Watkins for	2 66
196	Hjed & Mitchell for	3 42
197	R. Sinclair & Co. for	6 55
198	Boerman & Lutlebaum for	7 60
199	Weiglein & Heilner for	2 28
200	Walter S. Moore & Co. for	5 22
201	J. W. Ebert & Co. for	1 33
202	Thos. D. Johnson for	245 54
203	Bolton Bros. for	3 40
	204 David Anderson for	13 09
125	205 Wm. H. Oler for	3 70
	207 Evening Transcript for	22 33
No. 208	Montgomery, Slade & Co. for	1 14
209	Edward Sinn for	67
210	P. P. Pendleton for	20 53
211	D. Claude for	4 81
212	Hild, Wammell and Mitchell for	85
213	R. H. Tall for	74
214	John Nugent for	14 60
215	A. S. Abell & Co. for	4 18

216	Ammidon, Cranbie & Co. for	3 13
217	Page & Maury (or L. R. Page, their counsel) for	125 87
218	W. D. Miller for	218 43
	Making an aggregate of	$36,242 35

To be checked for by the creditors mentioned in account No. 5 returned with Com'r Leake's said report.

And the court doth retain the dividends of the following creditors mentioned in said report in account No. 5, who are alleged to be stockholders in default in payment of their assessments, until the further order of the court, to wit: John Farrell (No. 25), $3.78; J. Reynolds (No. 50), amounting to $8.74; J. Taylor (No. 74), amounting to $1.88; Canfield Bros. & Co. (No. 180), $72.00; Geo. W. Webb & Co. (No. 184), $4.81, and John B. Baldwin (No. 218), $354.45; and it being alleged that Wm. J. Hawkins claims to be the assignee of the claims of the Seaboard and Roanoke R. R. Co. (No. 13), on which the dividend would be $116.52, and of the Raleigh and Gaston R. R. Co. (No. 52), on which the dividend would be $230.32, making for the two $346.84, and it being alleged that said Hawkins is a delinquent shareholder, owing an assessment on —— shares, the said dividends are also retained on said debts until the further order of the court, and the court decides that the claim of Kelly & Piel (No. 206) should be disallowed, it appearing that the same has been paid, and the dividend of $428.25 allowed thereon is retained for future distribution, making a total retained dividend under account No. 5 aforesaid of $1,220.75; and the court doth further adjudge, order, and decree that John J. Kelly, late trustee under the deed of Sept. 20th, 1866, in the proceedings mentioned, have leave to file his petition setting forth his claims for compensation for his services and for repayment of expenses incurred by him in the discharge of his duties as such trustee and in rendering his final accounts, which petition is accordingly now filed and the court will here-
126 after consider the same, and it is expressly declared that nothing herein contained shall be construed as prejudicing his rights in regard thereto.

And the court doth further adjudge, order, and decree that John Glenn, trustee, out of the moneys now in his hands as such, do deposit at once in the Planters' National Bank of Richmond, to the credit of this cause, the sum of $2,795.43 to meet in part the sums distributed under this decree.

And the court not being prepared at this time to pass upon the question as to the claim of the Commonwealth of Virginia for priority of payment of its claim, mentioned in Commissioner Leake's report aforesaid, the court doth adjudge and decree that this cause be recommitted to Commissioner W. J. Leake (who is hereby appointed a special commissioner for the purpose), who is directed to ascertain and report to the court—

1st. Whether the Commonwealth of Virginia is entitled to any

priority of claim for payment of its said debts over the other creditors of the defendant company.

2d. Whether the petitioner, John J. Kelly, is entitled to any additional compensation for his services and expenses in executing the trusts of the deed of September 20, 1866, over and above such amount as has been allowed him under this decree.

All which the said commissioner will report to the court, with any matter specially stated, &c.

A copy.

Teste: GEO. W. CARTER, *Clerk.*

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, at the court-house, on Monday, the 15th day of February, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

Upon motion of the complainants, it is ordered that this cause be, and it is hereby, referred to Special Commissioner Wm. J. Leake to enquire and report with all convenient speed whether the present call and assessment upon the stockholders will realize a sufficient amount to pay the indebtedness of the company in fulfillment of the trusts of the deed, and, if not, what additional call and assessment will be necessary to that end, including the costs and expenses of collection and of the administration of the fund.

127 And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, at the court-house, on Tuesday, the 16th day of February, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

It is adjudged, ordered, and decreed that W. J. Leake do check on the Planters' National Bank of Richmond, on the fund therein to the credit of this cause, for the sum of one hundred and seventy-five ($175) dollars, in payment of his fees as special commissioner in this cause up to this date.

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for said county, at the court-house, on Friday, the 19th day of February, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

It is ordered that Charles Marshall and John Howard be, and the

same are hereby, anthorized each to check on the fund standing to the credit of the court in this cause in the Planters' National Bank of Richmond for the sum of one thousand dollars on account of professional services rendered by them to John Glenn, trustee, in this cause.

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, at the court-house, on Saturday, the 27th day of February, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

Upon motion of the executrix of John B. Baldwin, de-
128 ceased, it is ordered that so much of the decree entered in this cause on the 13th day of December, 1884, as retains the sum of $354.45, a dividend allowed upon the claim of the said John B. Baldwin by Commissioner Leake in his report of November, 1884, on the suggestion that the said Baldwin was a stockholder in the defendant company, be, and the same is hereby, rescinded, the court not now passing upon the question whether the said Baldwin was or was not such stockholder, and leave is hereby given to Susan Baldwin, executrix, &c., or Legh R. Page, her counsel, to check upon the fund to the credit of the court in this cause in the Planters' National Bank of this city, on filing therewith a certified extract from this decree, for the said sum of three hundred and fifty-four $\frac{45}{100}$ dollars, with interest thereon from the 13th day of December, 1884.

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, at the court-house, on Friday, the 26th day of March, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

This day this cause came on to be further heard upon the papers formerly read and upon the report of Special Commissioner Wm. J. Leake, filed in the clerk's office on the 13th day of March, 1886, to which there is no exception, and was argued by counsel. On consideration whereof, it appearing to the court that the debts due by the defendant company as of November 1st, 1884, principal and interest, exceeded the sum of five hundred and eighty thousand dollars ($580,000), and that the returns from the present call of thirty per cent. will probably not exceed two hundred thousand dollars ($200,000), leaving, say, three hundred and eighty thousand dollars, and all interest accumulated since November 1st, 1884, and to accumulate, and accruing costs and expenses still to be paid, the court is of opinion and doth accordingly order, adjudge, and decree

that, in addition to the said call of thirty per cent., it is now necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company, and doth therefore further adjudge, order, and decree that a call and assessment be, and the same is hereby, made upon the capital stock and stockholders of the said National Express and Transportation Company of fifty per centum of the par value of the said stock, being fifty ($50) dollars on each and every share thereof, and that the stockholders of said company and each
129 and every of them and their legal representatives and assigns be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to John Glenn, of the city of Baltimore, in the State of Maryland, substituted trustee in said deed of trust from said company of the 20th day of September, 1866, in the proceedings mentioned, and the said trustee is hereby authorized and directed to collect and receive the said call and assessment and to take such prompt steps toward that end, by suit or otherwise, and in such jurisdictions as he may be advised, and liberty is hereby reserved to the creditors and to said trustee to move the court for such further order in the premises as may be necessary and proper.

And in respect to the collections to be made under this decree the same directions are given to the said trustee as are contained in the decree of December 14th, 1880, in reference to collections to be made and the proceedings to be had thereunder.

The report of Commissioner William J. Leake, referred to in the foregoing decree and filed on the 13th day of March, 1886, is in the following words and figures, to wit:

"(*Report.*)

"COMMISSIONER'S OFFICE, *March* 12, 1886.

"W W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.*

"To the circuit court of the county of Henrico:

"The undersigned respectfully reports to the court that on February 16th, 1886, at the instance of John Howard, Esq., counsel for the complainants, and John Glenn, trustee, he issued notices to all the parties to the above-mentioned case, fixing on this office as the place and February 22d, 1886, as the time for executing the requirements of the order of reference entered in this suit on February 15th, 1886. The said notice, with evidence of service thereof endorsed thereon, will be found returned herewith.

"The said order of reference was in the following words:

"Upon motion of the complainants, it is ordered that this cause be, and it is hereby, referred to Special Commissioner Wm. J. Leake to enquire and report with all convenient speed whether the present call and assessment upon the stockholders will realize a sufficient

amount to pay the indebtedness of the company in fulfillment
130 of the trusts of the deed, and, if not, what additional call and assessment will be necessary to that end, including the costs of collecting and of the administration of the fund.

"On February 22d, 1886, your commissioner, attending at his office and in the presence of John Howard, Esq., counsel for the complainants and counsel for John Glenn, trustee, took the deposition of said John Glenn, which is herewith returned.

"The deposition and the special report of John Glenn, trustee, therein mentioned and the papers previously in the cause furnish the basis for this report. In response to the said decree of the 15th February, 1886, your commissioner reports that the present call and assessment upon the stockholders will not realize a sufficient sum to pay the indebtedness of the company in fulfillment of the trusts, and that an additional call and assessment will be necessary for that purpose.

"What additional call and assessment will be necessary?

"In order to answer this enquiry the commissioner will refer the court to Commissioner Leake's report of November 5th, 1884, from which it will appear that the debts due by the National Express and Transportation Company up to November 1st, 1884, exceeded ---------- $580,000 00

And it appears that the net returns from the present call of 30 per cent. will probably be ---------- 200,000 00

Leaving, say ---------- $380,000 00

and all the interest to accumulate since the 1st of November, 1884.

"If a call for 30 per cent. will only produce $200,000 net it is probable, nay, almost certain, that it would take an assessment or call of 50 per cent., the balance remaining uncalled, to produce $380,000 net, to say nothing of increasing indebtedness from the accumulation of interest and the loss of solvent subscriptions by death, &c.

"Special reference is made to the deposition of John Glenn hereto annexed.

"Respectfully submitted,

"WM. J. LEAKE,
"*Special Commissioner.*

"Commissioner's fees for this report, notices, and depositions and examining papers, $15, charged to trustee."

"COMMISSIONER'S OFFICE, *February 22d*, 1886.

"GLENN'S ADMINISTRATOR, &c.,
against
"THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.*

"The depositions of John Glenn and others taken before
131 me, Wm. J. Leake, special commissioner of the circuit court of Henrico county, on this 22d February, 1886, at my office, Richmond, Virginia, pursuant to a decree rendered in said cause on

the 15th February, 1886, and notice duly given to this date, to be read in evidence in the above-entitled cause.

"Present: John Howard, Esq., of counsel for complainants and of counsel for John Glenn, trustee; John Glenn, in person.

"JOHN GLENN, a witness of lawful age, being first duly sworn, deposes and says as follows:

"1st question by commissioner. Are you the trustee substituted as such under the decree of December 14th, 1880, in this suit?

"Answer. I am.

"2d question by same. Please read over the decree of the 15th February, 1886, entered in this suit and under which the commissioner is now acting, and state to the commissioner—

"1. Whether the present call and assessment upon the stockholders will realize a sufficient amount to pay the indebtedness of the company in fulfillment of the trusts of the deed; and, if not,

"2nd. What additional call and assessment will be necessary to that end, including the costs and expenses of collecting and of the administration of the fund?

"Answer. I have already read the decree in question, and I am not only satisfied that the present call will not yield sufficient money to liquidate the indebtedness of the company, but if the same obstructions continue to be thrown in the way it is very doubtful whether a call for the fifty per cent. additional still uncalled for will liquidate that indebtedness. I would refer the court to my last report, where the condition of affairs is entered into in detail—I mean the condition of affairs showing the difficulties surrounding the execution of this trust and showing the causes tending to diminish the returns from any call, no matter what the amount.

"The present call of thirty per cent. has so far yielded about $80,000 net for distribution under the deed. If the exhaustion of this call yields $200,000 net, I shall be very much surprised. In a further call many of the stockholders, collections from whom make up the amount of the present call, can never again be reached, and there is every reason to believe that as we go on collecting under the present call still more of those who are obliged to pay will place their affairs in a way to avoid any possibility of reaching them in the future.

"We have had instances of this already. The unpaid indebtedness, as shown by the commissioner's report, now exceeds a
132 half million of dollars and is increasing daily by the accumulation of interest.

"And further this deponent saith not.

"JOHN GLENN.

"Sworn to and subscribed before me by the said John Glenn, in the city of Richmond, Va., this 22d day of February, 1886.

"WM. J. LEAKE,
"*Com'r in Chancery.*"

"VIRGINIA:

"In the Circuit Court of the County of Henrico, February 15th, 1886.

"GLENN'S ADMINISTRATOR, &c.,
against
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.*

"Upon motion of the complainants, it is ordered that this cause be, and it is hereby, referred to Special Commissioner Wm. J. Leake to inquire and report with all convenient speed whether the present call and assessment upon the stockholders will realize a sufficient amount to pay the indebtedness of the company in fulfillment of the trusts of the deed; and, if not, what additional call and assessment will be necessary to that end, including the costs of collecting and of the administration of the fund.

"A copy.

"Teste: GEORGE W. CARTER, *Clerk.*"

"*Notice.*

"COMMISSIONER'S OFFICE,
"RICHMOND, VA., *February 16th*, 1886.

"The parties to this suit are hereby notified that I have fixed on this office (corner Eleventh and Bank streets) as the place and Monday, February 22d, at 12 o'clock m., as the time for executing the requirements of the above-mentioned decree.

"WM. J. LEAKE, *Commissioner.*"

133 "(Endorsed.)

"We acknowledge service of the within notice.

McGUIRE & ELLETT,
JOHN HOWARD,
Attorneys and Counsel for the Trustee, John Glenn, and the Creditors Whose Claims Were Established by Decree of 14th December, 1880.
CHRISTIAN & CHRISTIAN.

"Executed in the city of Richmond February 17, 1886, by delivering to Joseph R. Anderson, director of the National Express and Transportation Company, a copy of the within, he being a resident of the city of Richmond and the only officer of said company residing in the city of Richmond.

"LEWIS P. WINSTON,
"*Sheriff City Richmond.*"

And at another day, to wit, at a circuit court of the county of Henrico, continued by adjournment and held for the said county, at the court-house, on Saturday, the 10th day of April, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

Upon reading the petition of John Glenn, trustee, and Exhibit "A" therewith, this day filed, it is ordered that the matter of said petition be referred to Special Commissioner Wm. J. Leake to enquire and report what additional commissions or what specific additional compensation, if any, it is right and proper that the said trustee shall receive for his services in the execution of the trusts of the deed of September 20th, 1866.

The petition and Exhibit "A," referred to in the foregoing order, are in the following words and figures, to wit:

134 (*Petition.*)

"GLENN'S ADMINISTRATOR, &c.,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY *et als.*

"To the Hon. B. R. Wellford, judge of the circuit court of Henrico Co., Va.:

"The petition of trustee, duly appointed in the above case, respectfully shows—

"That, notwithstanding the decision of this honorable court on the conclusiveness of the decree passed by the chancery court of the city of Richmond on December 14th, 1880, and notwithstanding that the said decision has been supported by decisions in five circuit courts of the United States, two State supreme courts, and two separate decisions in the circuit court for the District of Columbia, each step of the trustee is obstructed by every device that can suggest itself to the defendant stockholders or their attorneys. This cause not only involves the execution of the trust in immense and what would otherwise be needlessexpense, but it makes necessary for the trustee an amount of labor which does not properly belong to a trustee, but without which this trust never could have been executed.

"Your trustee has been obliged not only to visit the different points where cases were instituted for the purpose of giving them personal attention, but, after institution, has been obliged to revisit these points, many of them remote, again and again in order to secure the bringing of these cases to trial, and he has done this, as promptness is of the greatest importance to the solvent stockholders, who are finally to pay these debts.

"These causes have brought up points little understood by the bar generally, and your trustee has been obliged not only to get up the facts by statement of the accounts, of which there is a very great number, but has been obliged to get up the law and furnish it in numberless instances.

"Besides this, he has been called upon to state accounts over and over again for stockholders, whose only object has been to obstruct,

and when it is considered that there are over one thousand of these stockholders, and one-half of them are, directly or indirectly, through their attorneys, requiring information, your honorable court will understand the labor connected with this trust.

"Besides this, in every case so far, except the Missouri, Illi-
135 nois, California, and Texas cases, your trustee has been obliged to produce witnesses at time of trial to prove the books, to produce the books themselves, and to be present in person as a witness.

"In the Raleigh cases the books were produced, thrice the case being continued.

"In the New Orleans cases the books were produced, and your trustee, with his witness, were detained for some time for the action of the court.

"In the Charlotte cases your trustee and witnesses were detained a whole week, and your trustee has been informed that the books must be shortly produced at Atlanta, Montgomery, and West Virginia. See exhibit filed herewith, marked 'Exhibit A.'

"It is only necessary to refer to the accounts already filed to show the constant absence which three requirements render necessary.

"Your trustee has endeavored, by producing the books once and showing the accounts to the attorney and offering to furnish an exact transcript, to prevent the loss of time and expense incurred in this constant production, but the only reply has been that the books must be produced in each case.

"From the experience of the last five years, for five years have elapsed since the rendition of the decree, it is not unreasonable to believe that more than this time must elapse before this trust can be executed.

"Your trustee respectfully represents that in consideration of the above facts and of the labor, time, and responsibility connected with this trust the compensation allowed by the deed of trust is inadequate, and asks that the court will allow him on the collections made and to be made an additional commission of — per cent. for his services, or such additional specific compensation as may seem proper to report under the circumstances; and he prays that such other further and general relief may be granted to him as to equity may seem meet.

"JOHN GLENN.

"CITY OF RICHMOND, *To wit:*

"This day John Glenn personally appeared before me, a notary public in and for the city of Richmond, Virginia, and made oath that the facts stated in the foregoing petition are true, as he verily believes.

"Given under my hand this 5th day of April, 1886.

"WM. J. LEAKE, *N. P.*"

136 "EXHIBIT 'A.'

1880, Dec. 29 and 30, Richmond.—In connection with bonds.
1883, July 20, 21, Richmond.—To contest petition of Hurst *et als.* to set aside decree. Books produced.
Aug. 18 and 19, Richmond.—In connection with petition. Books produced.
Aug. 24 and 25, New York.—To procure missing books and examine record regarding stockholders.
Sept. 1 to 24, inclusive, St. Louis, Cincinnati. } To meet compromising stockholders and arrange for suits.
Oct. 12, Washington.—To arrange for bonds in attachment suit and consult with counsel.
Oct. 15th to Nov. 2, inclusive, Richmond, Raleigh, Charleston, Savannah, Augusta, Atlanta, Montgomery, Mobile, New Orleans. } To arrange with local counsel and advise as to what suits to bring.
November 12 and 13, Richmond.—To consult with court as to employment of counsel.
Dec. 3d, Philadelphia.—To advise with local counsel as to stockholders and to arrange for compromise.
Dec. 12, Washington.—In connection with court proceedings, &c.
1884, Jan'y 18th, Washington.—In connection with court proceedings and to consult as to condition of stockholders.
Feb. 26 to M'ch 11, inclusive, Richmond, Raleigh, Atlanta, Montgomery, Mobile, New Orleans. } To advise with local counsel as to condition of stockholders and as to proposals from opposing counsel.
April 14 to 19, inclusive, St. Louis, Parkersburg, Cincinnati, Chicago. } To advise with local counsel and investigate the conditions and whereabouts of certain stockholders.
April 14, Richmond.—Attorney sent in connection with making new parties to suit.
May 23 to 25, inclusive, Richmond.—Court proceedings.
June 13 to 15, inclusive, Richmond.—Court proceedings.
June 25 to 28, inclusive, Charlottesville, Lynchburg, Staunton. } In connection with compromises and suits.

137 Aug. 6 to 8, Norfolk.—To advise with local counsel.
Oct. 6 to 8, Richmond.—In connection with court proceedings.
Oct. 27 to 28, Charlottesville.—In connection with suits. Books produced.
Nov. 13 to 15, Richmond.—With records.

Nov. 17 to 21 inclusive, Montgomery, Atlanta. } With books.
Dec. 1, Richmond.—Attorney to R.
Dec. 3 to 6, Raleigh, N. C.—Suits assigned and postponed. Books produced.
Dec. 10 to 12, Raleigh, N. C.—Suits assigned and postponed. Books produced again.
Dec. 17 to 19, Cincinnati.—In attachment suit.
Dec. 22 to 23, Charlottesville.—Clerk with books to take depositions.
1885, Jan. 6 to 7, Covington, Va.—Clerk with books.
Jan. 20 to 22, Richmond.—With attorney to oppose Georgia petition. Books produced.
Feb. 4 to 5, Richmond.—Attorney and clerk with books to oppose Georgia petition.
Feb. 19 to 21, Richmond.—Attorney and clerk with books to oppose Georgia petition.
April 2 to 13, New Orleans, Montgomery, Atlanta. } To try cases, consult with counsel, and produce books for examination.
April 27 to 28, Charlottesville.—Clerk with books to take depositions.
June 3 to 7, Raleigh.—To try suits. Books produced.
June 13, Philadelphia.—To see opposing counsel.
July 14 to 20, New York, Boston. } To consult with counsel in suits instituted or to be instituted.
July 22 to 24, Richmond.—In connection with Virginia cases.
Aug. 31, Sept. 1st and 2d, Norfolk.—To arrange for changing counsel and pressing suits.
Sept. 8, 11, Lexington, Staunton. } Clerk to examine papers of M. G. Harman.
Nov. 4 to 6, Staunton.—Clerk with books to take depositions.
Nov. 24 to 26, New York.—Clerk with books to take depositions.
Dec. 12 to 19, Charlotte, N. C.—To try cases. Books produced.
1886, Jan. 4, Richmond.—For consultation.
Jan. 11, Washington.—In connection with attachment suit and other cases, compromise, etc.

And at another day, to wit, at a circuit court of the county
138 of Henrico, continued by adjournment and held for the said county, at the court-house, on Tuesday, the 15th day of April, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

This day this cause came on to be further heard upon the papers formerly read and upon the petition of John Glenn, trustee, this day filed, and was argued by counsel; on consideration whereof the court, being of opinion that the prayer of said petition is reasonable and proper and should be granted, doth adjudge, order, and decree that the clerk of this court, in making out a copy of so much of the

record in this cause as may be required by the said John Glenn, trustee, for showing his right and authority to sue the stockholders of the defendant company for the call and assessment of fifty per cent. of their stock made by the decree entered in this cause on the 26th day of March, 1886, may, after inserting the proceedings had up to and including the decree entered in the cause on the 25th of March, 1885, as prescribed in said decree, omit the following matters and things of date subsequent to the said decree of the 25th of March, 1885:

The matter of the injunction restraining the payment of John O. Reid's estate of a certain sum decreed to it on the 13th day of December, 1884; the matter of the petition of Stephen W. Jones, a creditor of said company; the report of the clerk of this court, filed on April 4th, 1885, touching the tax on the fund in bank to the credit of the court and cause; the matter of the petition of John Blair Hoge as to compensation for his services as trustee; the matter of the petition of John J. Kelley touching his claim to compensation and reimbursement as trustee; the matter of the petition of James L. Kemper, an alleged stockholder, for a compromise of his liability; the matter of the petition of W. R. McGee, an alleged stockholder, for a compromise of his liability; the several reports and accounts of John Glenn, trustee, of his transactions as trustee; the matter of the petition of Agnes H. M. Taliaferro for a compromise of the liability of the estate of Alexander G. Taliaferro, deceased; the matter of the petition of Robert P. Dodge for a compromise of his liability, and the matter of the petition of John Glenn, trustee, touching the liability of the estate of Joshua H. Evans, deceased, and praying liberty to accept a compromise as to the same, the court being of opinion and so deciding that the several matters and things above specified are immaterial and irrelevant to the validity of the said decree of the 14th of December, 1880, and the 3d of January, 1881, establishing the right and authority of the said
139 John Glenn, trustee, to collect said assessment of thirty per cent. of the unpaid subscriptions to the capital stock of the defendant company; which decrees remain in full force as when first entered, and that the said several matters and things above specified are also immaterial and irrelevant to and have no bearing upon the validity of the said decree of March 26th, 1886, making an additional call and assessment of fifty per cent. upon the said capital stock and stockholders of said company.

The petition referred — in the foregoing decree is in the following words and figures:

"W. W. GLENN'S ADMINISTRATOR and *als.*
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

"The petition of John Glenn, trustee, respectfully states that on the 26th of March, 1885, a decree was entered authorizing the clerk of this court, in making out a copy of so much of the record in this

cause as might be required by your petitioner for showing his authority to sue the stockholders of the defendant company for the assessment of thirty per cent. of their stock, as prescribed by the decree of December 14th, 1880, to omit the matters and things specified in a petition filed by your petitioner as immaterial and unnecessary in any litigation instituted to enforce the payment of said assessment. Your petitioner now states that since the 25th day of March, 1885, certain other voluminous proceedings have been had in the further administration of the trust, which, with the exhibits filed, have considerably increased the bulk of the record without in any manner affecting the original and direct proceedings which resulted in the decree of December 14th, 1880.

"The subsequent matters embrace petitions by new creditors praying permission to prove their debts, and proceedings had thereon; accounts and reports filed by your petitioner showing his acts and doings under said decree of December 14th, 1880; reports filed by Master Commissioner Wm. J. Leake respecting the same petitions filed by various stockholders presenting offers of compromise of their liabilities, under the act of Assembly of March 17th, 1884, and the proceedings had thereunder, and like matters of administration, neither the substance or the details of which have any relevancy either to the said decree of December 14th, 1880, making a call of thirty per cent. upon the capital stock of the company, or to the similar decree entered in this cause on the 26th day of March, 1886, making a call of fifty per cent. on said stock, being the remainder then uncalled for and unpaid upon the same.

"Your petitioner further shows that on the 15th day of February, 1886, a decree was entered in this cause directing Special
140 Commissioner Wm. J. Leake to enquire and report with all convenient speed whether the present call and assessment upon the stockholders will realize a sufficient amount to pay the indebtedness of the company in fulfillment of the trusts of the deed, and, if not, what additional call and assessment will be necessary to that end, including the costs of collecting and of the administration of the funds. After due proceedings had under the said decrees, the said commissioner filed his report on the 13th day of March, 1886, and in accordance with that report, on the said 26th day of March, 1886, the said decree was entered making the additional call of fifty per cent. upon the capital stock of the company as aforesaid.

"Your petitioner further states that, in view of the said last decree, it is now necessary that such an amendment be made to the record to be used in enforcing the said decree as will show the said special proceedings resulting in the said decree and the said decree itself; but your petitioner is advised that the said above-described proceedings appertaining and incidental to the administration of the trust are wholly immaterial for such purpose, and if copied and made part of the record for the purpose of showing your petitioner's right and authority to sue for and collect the said fifty per cent. required to be paid by the said decree of March 26th, 1886, the same would only uselessly augment the already enormous bulk of the record, and in case of appeal in any of the numerous suits to

be brought in the enforcement of the said decree would inflict either upon the plaintiff or the defendants a totally unnecessary amount of additional costs in taking the litigation to an appellate court. It is the duty and object of your petitioner to prevent incurrence of unnecessary costs in the premises, and he therefore prays that the court will pass an order directing the clerk of this court (as was done by the said order of the 25th of March, 1885, in reference to similar matters)—directing the clerk of this court, in making out a copy of so much of the record in this case as may be required by your petitioner for showing his authority to sue the stockholders of the defendant company for the said call and assessment of fifty per cent. of their stock, as prescribed by the said decree of March 25th, 1886, to omit the matters and things specified in the foregoing petition as immaterial and unnecessary in any litigation in respect to the enforcement of said call and assessment.

"JOHN GLENN, *Trustee.*"

141 [Endorsed:] Supreme Court U. S. 1889, October term. No. 67. John Glenn, trustee of the National Express & Transportation Co., pl'ff in error, *vs.* Thomas J. Sumner. Stipulation as to printing addition to record.

[Stamped:] Office Supreme Court U. S. Filed Sep. 20, 1889. James H. McKenney, clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889. No. 331

JOHN GLENN,

Trustee of the National Express and Transportation Company,

PLAINTIFF IN ERROR,

vs.

THOMAS J. SUMNER,

DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

BRIEF OF THE PLAINTIFF IN ERROR.

John Glenn, trustee, plaintiff in error, instituted an action of assumpsit against the defendant in error, Thomas J. Sumner, on the 16th day of November 1883, in the Circuit Court of the United States for the Western District of North Carolina, upon the following cause of action:

The plaintiff below alleged that by a decree of the Chancery Court of the city of Richmond in the State of Virginia, passed on the 14th day of December 1880, in a cause therein pending in which John W. Wright sheriff of the city of Richmond, and as such, official administrator of W. W. Glenn deceased, and

other persons claiming to be creditors of the National Express and Transportation Company, a body corporate under the laws of the State of Virginia, were plaintiffs, and the said National Express and Transportation Company, John J. Kelly, John Blair Hoge and others were defendants, an assessment of thirty dollars a share was levied upon the stock and stockholders of the National Express and Transportation Company, for the purpose of paying the debts of said company, ascertained and established by the said decree of the Chancery Court.

He further alleged that by that decree, he, the said Glenn, had been appointed trustee to execute the provisions of a deed of trust made by said National Express and Transportation Company on the 20th day of September 1866 to John Blair Hoge, John J. Kelly and C. Oliver O'Donnell, as trustees for the benefit of the creditors of said company, by which deed the said company conveyed to the said trustees all its property of every kind, in trust for the payment of its debts according to certain priorities established by said deed, the said original trustees having been removed from the trust by the decree.

He alleged that he had duly qualified to act under said decree, and that by virtue of his appointment he became entitled to sue for and collect from the stockholders of the National Express and Transportation Company the amount of the said assessment of thirty dollars per share on their stock.

He further alleged that the plaintiff in error, Thomas J. Sumner, was the holder of two hundred and fifty (250) shares of the stock of said company at the time of the said decree, and that by virtue thereof the said Sumner had become indebted to him, the said Glenn, trustee, to the amount of seven thousand five hundred ($7,500) dollars, and being so indebted had promised to pay the same to him.

The complaint sets out but a single cause of action.

The first defence made by the answer is in effect a general denial of the cause of action set forth in the complaint. It is contained in the first four paragraphs of the answer, and makes the first issue.

The second issue is made on the plea of the Statute of Limitations of three years.

The third issue is on the plea of the Statute of Limitations of ten years.

These pleas of limitations constitute the second defence.

The fourth issue is upon a plea of the defendant that he had subscribed for fifty shares in a company which sometime afterwards organized as the National Express and Transportation Company. That he paid no money, received no certificate for his shares, and transferred them to one Hart, who, or whose assignees, were accepted by the company in the place and stead of the defendant.

The plea then states that this transfer was made more than ten years before the suit was brought, and sets up the Statute of Limitations in such case in bar of the same.

Precisely what issue this plea tenders is not seen, but it is the fourth issue in order.

The fifth issue is upon the plea that the defendant was adjudicated a bankrupt on the 4th of August 1875, by the District Court for the Western District of North Carolina, and received his discharge on the 31st day of May 1879.

The error complained of arises from the instruction of the Court on the issue made on this plea.

The bill of exceptions to be found on the pages 8 and 9 of the Record, shows that at the trial of the case, it was proved that the defendant was a stockholder of the National Express and Transportation Company, a corporation under the laws of the State of Virginia, to the amount of two hundred and fifty (250) shares; that at the time of the organization of the Company, he paid a certain percentage on his stock, and that the residue was unpaid. That the corporation suspended business, became insolvent, and made a deed of trust to trustees to secure its creditors in the year 1866. That in the year 1875 the defendant filed his voluntary petition in bankruptcy in the District Court of the United States, and was thereafter adjudged a bankrupt, and discharged from all his debts and liabilities in the year 1879. That a decree was

rendered on the 14th day of December 1880, by the Chancery Court of the city of Richmond, as set forth in the complaint, and a copy of the Record of that case is made part of the bill of exceptions.

The present suit was brought on the 16th of November 1883, to recover from the defendant thirty per cent. of the par value of the two hundred and fifty (250) shares held by him, and the answer shows the defences set up, which include the plea of his discharge in bankruptcy in bar of recovery.

That the plaintiff contended that it was not a provable debt at the time of filing the petition in bankruptcy.

The Court held that it was a provable debt, and that the discharge barred it, and so instructed the jury; and that the jury rendered a verdict for the defendant.

The bill of exceptions is not altogether in the usual form, and it has been agreed that it shall be treated as corrected in accordance with the certificate of the Circuit Judge before whom it was tried.

John Glenn, *Trustee*,	In the Supreme Court of the United States.
vs.	
Thomas J. Sumner.	*October Term*, 1889. No. 67.

Stipulation of Counsel.

It is agreed that the bill of exceptions in this case shall be treated and considered as if amended in accordance with the certificate of the Hon. Hugh L. Bond, bearing date the 12th day of October 1889, and hereto attached.

S. F. Philips,
For Sumner.

Charles Marshall,
John Howard,
For Glenn, Trustee.

October 14 1889.

JOHN GLENN, *Trustee of the National Express and Transportation Company*, PLAINTIFF, vs. THOMAS J. SUMNER.	IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

I, Hugh L. Bond, Judge of the Circuit Court of the United States for the Fourth Judicial Circuit, do certify that I presided at a Circuit Court of the United States held for the Western District of North Carolina, begun on the second Monday in December, in the year eighteen hundred and eighty-five, at the Court-House in the city of Charlotte, in the State of North Carolina, at which term of said Circuit Court, and on the 18th day of December in the year aforesaid, there was tried before me as such Judge of said Court, the case of John Glenn, trustee of the National Express and Transportation Company, against Thomas J. Sumner; and I do further certify that I wrote and signed the bill of exceptions in said cause, as the same now appears in the printed Record of the said case, now pending in the Supreme Court of the United States, entitled, John Glenn, trustee of the National Express and Transportation Company, plaintiff in error, against Thomas J. Sumner, defendant in error, in the words and figures following:

EXCEPTIONS.

Circuit Court of the United States, Western District of North Carolina, at Charlotte. December Term, 1885.

JOHN GLENN, trustee of National Express and Transportation Co., Plaintiff,

vs.

THOS. SUMNER, Defendant.

The plaintiff excepts to the ruling of the Court in above entitled case, and for cause of exception shows that upon the

trial in said case, at term aforesaid, it was proved that the defendant, Thos. J. Sumner, was a stockholder in the National Express and Transportation Company, a corporation duly organized under the Act of the Legislature of Virginia, ratified 12th December 1865; that at the time of the organization of said corporation, he paid per cent. on his said stock, and residue was unpaid; that the said corporation suspended business because insolvent, and made a deed of trust to trustees to secure its creditors in the year 1866; that in the year 1875, the defendant filed his voluntary petition in bankruptcy in said district, and was thereafter adjudged a bankrupt, and discharged from all his debts and liabilities in the year 1879.

It was further proved that a decree was rendered on 14th December, 1880, in a suit in Chancery Court of the city of Richmond, a Court of competent jurisdiction over said corporation, wherein Glenn administrator, was plaintiff, and the said National Express and Transportation Company was defendant, and certain trustees under a deed of assignment executed by the said company, conveying all its property, choses in action, as well as unpaid capital stock of said defendant, and from said decree it appeared that a call of only 20 per cent. of the capital stock had been made, and that there remained eighty dollars per share which had not been called for or paid; and in order to pay debts of said company provided for in said assessment, a call of thirty per centum upon the capital stock of said company was made by said Court. A copy of Record of said Chancery Court of Richmond is hereto appended as a part hereof, marked A. The original bill therein was filed in 1871. Suit was brought on 16th November 1883, to recover of defendant 30 per cent. of the par value of the 250 shares stock held by him. The answer shows the defences set up, which include the plea of his discharge in bankruptcy, in bar of recovery.

The plaintiff contended that it was not a provable debt at the time of filing of petition in bankruptcy. The Court held that it was a provable debt, and that discharge barred it, and so instructed the jury. Verdict for defendant.

HUGH L. BOND, *Circuit Judge.*

And I do further certify that at the trial of said cause, the counsel for the said John Glenn trustee, excepted to the ruling of the Court set forth in said bill of exceptions at the time said ruling was made, and that said exception was allowed and noted by the Court at the time the same was taken, and before the verdict was rendered therein.

I further certify that the word "excepts" appearing in said bill of exceptions, was written instead of the word "excepted" by a clerical error.

Given under my hand this 12th day of October, in the year eighteen hundred and eighty-nine.

HUGH L. BOND, *Circuit Judge.*

ASSIGNMENT OF ERROR.

The plaintiff in error assigns as error that the Court below erred in charging the jury that the discharge of the defendant in bankruptcy on the 31st day of May 1879, was a bar to his said action against the defendant.

The Record shows that the jury rendered a verdict in favor of the defendant on all the issues joined, including the issue on the plea of his discharge in bankruptcy, as to which the jury found their verdict under the instruction of the Court, assigned as error in this case.

How far the instruction may have affected the finding of the jury on the other issues in the case, it is impossible to say.

The rule of this Court, in cases of this kind, we take to be as it is stated in the cases of

Deery's Lessee vs. Cray, 5 Wal. 75, and
Smith vs. Shoemaker, 17 Wal. 630.

"While it is a sound principle that no judgment should be reversed on error, when the error complained of worked no injury to the party against whom the ruling was made, it must

appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party."

This Court has also said: "In the view we take of this case, it is not necessary to notice the assignment of error upon the instructions to the jury by the Court below. In some respects, they may be technically inaccurate, and in others, they were far too favorable to the defendants. But in any event they did not materially affect the merits of the action; and as there were no disputed facts bearing on the real matter in controversy, the Court could have properly told the jury to find as they did. Indeed, the verdict was so obviously right, that the Court would not set aside the judgment, where the Record shows that no other result could be obtained on a new trial."

Walburn vs. Babbitt, 16 Wallace, 577.

We think it will be easy to show that but for the ruling complained of, the Court below under the decision made by it in the Western District of North Carolina, affirmed by this Court in the late case of Hawkins vs. Glenn, decided at the close of the last term, would have been bound to instruct the jury that the plaintiff was entitled to recover on all the other issues, and that on a new trial, it must so instruct the jury, upon the evidence set forth in the bill of exceptions.

The evidence at the trial as shown by the bill of exceptions, showed:

1. That the defendant in error was the holder of 250 shares of the stock of the National Express and Transportation Company, on which he had paid something.

2. That proceedings were had in the Chancery Court of the city of Richmond, in a suit brought by creditors of the company to enforce the provisions of a deed of trust made by it for the benefit of its creditors, in which suit the company and some of its officers were defendants, and that by a decree passed in that case, an assessment of thirty dollars per share was levied upon the stock and stockholders of the company on the 14th day of December, 1880.

These facts are identically the same as those in the Hawkins' case.

The bill of exceptions does not show that any evidence was offered to contradict the above statement. In fact, as to the Richmond decree, the defendant in error could not have disputed it, and as to his being a shareholder, the proof which must have been documentary in its character, seems to have been uncontradicted.

The suit was brought less than three years after the decree levying the assessment.

It is plain that but for the ruling assigned here as error, the Court below could not have refused a new trial had one been moved for, and it is equally plain that with that ruling unreversed, a motion for a new trial must have been denied.

It is equally clear that if that ruling be reversed, the Court would be warranted in instructing the jury that their verdict must be for the plaintiff in error.

If as is said in the case above cited from 16th Wallace, when the verdict is obviously right the "Court will not reverse the judgment when the Record shows that no other result could be obtained on a new trial," it seems that the converse must be also true, that when the verdict is so obviously wrong, that a different result must necessarily follow the reversal of the ruling complained of, the judgment will be reversed, if the Court decides that there was error in the ruling.

Upon the main question, we submit:

1st. The stock of the defendant Sumner, did not pass to his assignee in bankruptcy, but remained the property of Sumner notwithstanding his adjudication as a bankrupt, and the execution of the deed to his assignee.

The evidence shows that at the time Sumner was adjudicated a bankrupt, the stock had long ceased to be profitable, and was likely to involve the holder of it in loss.

It was what is called "*damnosa hereditas*," and it was not only the right, but the duty of the assignee in bankruptcy, to decline to accept it as part of the bankrupt's estate.

There is no allegation in the plea that the assignee did accept it, nor any proof to that effect in the Record.

Under the circumstances shown in evidence, the presumption is that the assignee did not accept the stock. In fact he could not have become a stockholder, as between himself and the company, because the law of Virginia provides that only the person in whose name the stock stands shall be regarded as a stockholder, as it regards the company.

Code of Va., 1860, title 18, chapter 57, section 27.

This principle has been established by the decision of this Court in the case of The American File Company vs. Garrett, 110 U. S. 288.

To decide that case, it was necessary to determine whether the assignee of a bankrupt stockholder of the File Company, acquired the shares of the company's stock that belonged to the bankrupt, by the mere force of the adjudication and assignment in bankruptcy.

But the appellants insist, and this is their second contention, that conceding Garrett & Sons to be bona fide holders of the bonds for value, without notice of any equities or defences, as against the first holders, they have nevertheless lost their right to enforce the individual liability of the stockholders, by reason of the agreement between them and the assignees of Chapman, whereby they assumed the liability of stockholders, and made themselves liable, through the assignees, to contribute to the other stockholders the money which they might collect from them on the bonds of the company.

It is clear that Garrett & Sons did not by this contract agree to become stockholders of the corporation, or to indemnify Chapman against his individual liability as a stockholder. The agreement will bear no such interpretation. The contract was made for the benefit of the assigness, by which they took an indemnity for themselves and the bankrupt estate. If, therefore, the assignees themselves are not liable as stockholders, Garrett & Sons, by this contract of indemnity, assumed no liability, and they hold the bonds in question unfettered by any equities or conditions.

It is well settled that, under the circumstances of the case, neither the assignees nor the assets in their hands are subject to the individual liability which attaches to stocks held by the bankrupt. The evidence does not show that the assignees acted in any way as stockholders, that they ever attended any meetings of the corporation, or that their names appeared upon its books, or that they treated the stock standing in Chapman's name as an asset of his estate. They merely had in their possession the certificates of stock, and yielded to Garrett & Sons any claim to the bonds of the American File Company belonging to Chapman or his firm, and took an indemnity against any supposed liability which might attach to them as holders of the stock belonging to the estate of Chapman.

In Gray vs. Coffin, 9 Cush., 192, the Supreme Court of Massachusetts, having under consideration a law of that State almost identical with the Rhode Island Statutes, held that the individual liability of "stockholders did not attach when their assignee had attended and voted at meeting of the corporation, and done other acts of unequivocal ownership." The same result would follow under the bankrupt law. It has long been a recognized principle of the bankrupt laws that the assignees were not bound to accept property of an onerous or unprofitable character.

South Staffordshire R. Co. vs. Burnside, 5 Exch., 129.
Furdoonjee's Case, 3 L. R., Ch. Div., 268.
Ex parte Davis, 3 L. R., Ch. Div., 463.
Streeter vs. Sumner, 31 N. H., 542.
Amory vs. Lawrence, 3 Cliff., 523.
Rugely vs. Robinson, 19 Ala., 404.

As the assignees of Chapman never accepted the stock, and never consented to become stockholders in the American File Company, it follows that neither they nor the assets of Chapman in their hands are subject to the individual liability of stockholders for the debt of the corporation.

The contract of indemnity did not therefore subject Garrett & Sons to any such liability. It follows that they took the bonds unaffected by any agreement in respect thereto between Chapman and his co-stockholders.

See also, Levi vs. Ayers, L. R. 3 Appeal Cases, 842.
Morton's Patent Anchor Co. vs. Morton, 3 Q. B. 306.
Same vs. Hewitt, 3 Q. B. 306, 311.
Amicable Ins. Co., Malone's case. 6 I. R. Eq. 272.
Ex parte Houghton, &c., Re Fortune, 1 Lowell, 554.
In re Webb & Co., 6 Bank. Reg. 302.
Savoy vs. Stockbridge, 4 Cush. 607.
Glenn vs. Howard, 65 Md. 40.

These authorities show that in order to make the assignee chargeable with the shares, it must be shown that he accepted them as part of the bankrupt's estate.

In this case the proof shows that they continued to be the property of the bankrupt, who, as we claim, became chargeable with the assessment levied upon the stock after his discharge.

2d. The effect of the decree of the Chancery Court of the city of Richmond, passed on the 14th day of December 1880, in the suit of Glenn administrator and others, against the National Express and Transportation Company and others, has already been established by this Court in the case of W. J. Hawkins, plaintiff in error, against John Glenn, trustee, &c., defendant in error, decided at the last October Term.

131 U. S. 319.

That judgment establishes the following propositions which are applicable to the case at bar:

First. That by the deed of trust executed by the National Express and Transportation Company on the 20th day of September 1866, the subscriptions to its capital stock which had not been called for, passed to the trustees, and that the creditors were limited to the relief which could be afforded under the deed, while stockholders could be subjected only to equality of assessment, and as the trustees could not collect, except upon call, and had themselves no power to make one, a call by the president and directors of the company was necessary, or if they failed to make the call, then a call by a Court of competent jurisdiction was necessary to enable the trustees to collect the uncalled subscription.

Second. That the Statute of Limitations in favor of a stockholder did not begin to run until such a call was made.

131 U. S., page 333.

The decree of the Chancery Court of the city of Richmond established the validity of the deed of trust under the laws of the State of Virginia, the domicile of the corporation.

All persons who dealt with the corporation, all its creditors, and all its stockholders, are bound by the law of that domicile, and consequently all of them were bound by the deed of trust. The deed of trust became in fact the law of the settlement of the affairs of the corporation. Whatever right the company had against its stockholders was transferred to the trustees, except of course the corporate franchise of the company to make calls upon its stockholders. That franchise the company could not assign or transfer as is established by the decree of the Chancery Court, and as is well settled by authority.

In the case of an insolvent corporation, where its affairs are not settled in a Court of bankruptcy under such a bankrupt law as that recently in force, or where its affairs are not to be settled as in the present case by the enforcement of the terms of a deed of trust such as that executed by this company, the creditors have two remedies:

1st. They may file a creditor's bill for a settlement of the affairs of the corporation, and for the appointment of a receiver; and in such a suit, a Court of Equity will adjust the equities among the stockholders, and if necessary levy an assessment equally upon all, sufficient to pay the debts of the corporation. This is a mode of proceeding pointed out by this Court in the case of Ogilvie vs. Knox County Ins. Co., 22 Howard. 380.

2d. Any creditor may file his bill against a stockholder, or any number of stockholders, and compel him or them to pay, if necessary, the whole amount remaining unpaid by them, to the company, and leave the stockholders thus compelled to pay their subscription in full to seek for contribution from their co-stockholders as best they may. This was the course actually pursued

in the case in 22 Howard, above cited, and also in the case of Hatch vs. Dana, 101 U. S. 214.

Both of these remedies were taken away from the creditors of this company by the effect of the deed of September 20, 1866. After the execution of that deed, the stockholders became entirely exempt from any liability to creditors, such as was enforced in the two cases above cited. No creditor of the bankrupt could have proved his claim against the estate in bankruptcy, to the full amount of what the bankrupt owed the company, or to any part of that amount, because the money belonged to the trustees, to be applied by them according to the priorities of the deed of trust.

The deed, as this Court has said in Hawkins vs. Glenn, had the effect of limiting the creditors to the relief which could be afforded under it, and of subjecting the stockholders to no assessment, except what the Court calls an *equality of assessment.*

It follows from this that at the time the defendant Sumner filed his petition in bankruptcy, and at the time of his adjudication as a bankrupt on the 25th of August 1875, his only liability as a stockholder of the National Express and Transportation Company, was a liability to pay to the trustees, under the deed of trust, such assessment as might be levied upon him and all the stockholders of the company *equally*, either by the company itself or by a Court of competent jurisdiction. Consequently, in considering the question as to whether the claim against Sumner, as a stockholder of the company, was a provable claim, we are confined to the inquiry whether such claim as the trustees had under the deed of trust, was a provable claim against his assignee or his estate at the time of his discharge.

The claim of the trustees was the same exactly as that of the company of which they were the assignees. The company could not exact from one stockholder more than it could exact from another, nor could the trustees.

Equality of assessment was the law of the liability of the stockholders to the company, and equality of assessment in like manner was the law of the liability of the stockholder to the trustees.

Was such a liability a provable debt at the time the proceedings in bankruptcy were begun?

We have shown that the trustees under the deed of trust alone were entitled to make whatever claim the campany may have had at the time of the bankruptcy.

We have also shown that the liability of the bankrupt was limited to a contribution, upon the call of the company or of the Court, at the same rate per share that was assessed upon all his co-stockholders.

His contract was not affected by his bankruptcy.

That contract is not *to pay a certain fixed sum upon a future contingency*, but it is to pay such sum or sums as may be required of himself and all other stockholders from time to time, *not exceeding a certain sum*, and regulated by the wants of the company.

Park B, in South Staffordshire Railway Company vs. Burnside, 5 Exch. 129.

Speaking of the obligation of a stockholder of a company whose affairs are in liquidation, this Court has said:

"There was no obligation resting on the stockholder *to pay at all*, until some authorized demand on behalf of the creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing, save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything, until the amount necessary for him to pay was at least approximately ascertained. Until then, his obligation to pay did not become complete."

Scoville vs. Thayer, 105 U. S. 155.

The Court in that case held: "That when stock is subscribed to be paid, upon call of the company, and the company refuses

or neglects to make the call, a Court of Equity may itself make the call, if the interests of the creditors require it. The Court will do what it is the duty of the company to do. * * * * But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or at the very least, some authorized demand upon him for payment, and it is clear the Statute of Limitations does not begin to run in his favor until such order or demand." Ibid.

The same view of the nature of the contract of the stockholder is taken by the Court of Appeals of Maryland, in the case of Glenn vs. Williams, 60 Md. 93, cited with approval by this Court in 131 U. S. *ut sup.*

"The contract contemplated the exercise of judgment and discretion on the part of the president and directors, as to the times and amounts of future payments on the stock, and there was nothing due from the stockholder until such amounts were determined on and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay or how much he would be required to pay. The subscription therefore was conditional as to the times and amounts of payment, and consequently there was no fixed obligation of the stockholder to pay, and no right of action against him until an assessment and call made, either by the president and directors or by the order of a Court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for."

Glenn vs. Williams, 60 Md. 122.

See also Chandler vs. Siddler, 3 Dillon, C. C. 477.
Robertson vs. Sibley, 10 Minn. 330–31.

In the former case, Mr. Justice Miller decided that a suit brought by a receiver of a corporation to recover from a stockholder, could not be maintained, "without a call or assessment, or something standing in the place thereof and equivalent thereto, either by the company or by a proper Court, in order to make the defendant liable."

This Court has defined an obligation of a like nature to that of the defendant below in the case of Kennedy vs. Gibson, 8 Wal. 505.

That was a suit by the receiver of a national bank against a stockholder, to enforce the personal liability of the latter.

The bank was actually insolvent, and a resort to the personal liability of the stockholders was actually necessary, as was apparent from the pleadings. The receiver filed a bill against all the stockholders, in which he alleged the insolvency of the bank, and the necessity of requiring the stockholders to pay the full amount of the personal liability of each. He did not, however, allege that this fact had been ascertained by the Comptroller of the Currency, and that the latter had ordered the receiver to sue. For this reason, among others, the defendants demurred, and the demurrer was sustained.

The Court held that the ascertainment by the comptroller, of the necessity to enforce the personal liability of the stockholders, "and of the amount to be paid by them," is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

8 Wal. 505.

The preliminary ascertainment of the necessity to enforce the personal liability of stockholders, in order to make them subject to an action, or to create an enforceable liability on their part, is in all respects analogous to the necessity of an authorized call or assessment by the corporation or by a Court of Equity, in order to create a liability of a stockholder to pay what remains uncalled of his subscription. The *liability to be called upon* arises in both cases from the relation in which the stockholder stands to the corporation and to its creditors. In the case of the personal liability of a stockholder in a national bank, *the liability to be called upon* is created by statute. In the case of a stockholder whose subscription is not fully paid, the *liability to be called upon* arises from his contract with the company, and the rights of creditors growing out of the insolvency of the company.

But in each case, until the proper authority makes a call, the liability of the stockholder is only a *liability to be called upon.*

It does not become a *liability to pay or to be sued*, until the proper authority actually makes the call.

No Court can assign a value to a *liability to be called upon*, so as to enable the party entitled to prove that claim in bankruptcy against the estate of a stockholder, except the Court *that has power and jurisdiction to ascertain the necessity to make the call, and the amount of the call.*

We take it that the receiver of an insolvent national bank could not prove a claim against the estate of a bankrupt stockholder, on account of his personal liability, unless the *comptroller*, and not *the Court in bankruptcy*, had first ascertained that it was necessary to enforce that liability, nor could he prove then for any greater amount than the comptroller might decide to be necessary.

To hold otherwise, would be to transfer to the Court in bankruptcy the power conferred by statute upon the Comptroller of the Currency.

In the case referred to, Gibson resisted successfully the attempt to substitute the judgment of the Circuit Court for the District of Maryland, for that of the Comptroller of the Currency. It will not be pretended that his right to do this would have been lost, if the receiver, instead of suing him, had attempted to establish his claim in a bankruptcy Court. That Court can no more assume the powers committed by law to the Comptroller of the Currency, than it can undertake to wind up the affairs of an insolvent corporation not within its jurisdiction, in order to ascertain whether a bankrupt stockholder of that corporation shall pay at all, and if he shall pay, how much he shall pay.

If the stockholder, by his contract or by statute, be not liable to pay at all, unless it be so determined by a recognized authority, then until that question shall be determined by that authority, the stockholder owes nothing; there is no debt, contingent or other, that can be proved or ascertained.

The authority that can decide this question is, in the first place, the company itself, of which the stockholder is a member. If

the company decides that it is necessary to call upon the stockholders for their unpaid subscriptions, in the absence of fraud, that decision is binding upon every stockholder, not only as to the necessity for the call, but also for the amount of the call. The company stands in the place of the Comptroller of the Currency, in the case in 8th Wallace, cited above. But if the company neglects or refuses to perform this duty, then a Court of Equity having jurisdiction over the company, may make the call, and its decree will have the same effect as a call by the company.

The Richmond decree conclusively establishes that, at the time Sumner began his proceedings in bankruptcy, the company had neglected or refused to perform its duty, and had, in fact, ceased to act at all as a corporation.

Consequently, when Sumner applied for the benefit of the bankrupt law, whatever liability he was under as a stockholder was entirely incapable of being proved or established, even approximately, except by the intervention of a Court of Equity of competent jurisdiction.

It appears that the amount of uncalled capital stock was over three millions of dollars, and the debts as ascertained by the decree, with interest to 1880, amounted to about half a million of dollars.

Under such circumstances it would be impossible to ascertain what *equal assessment* of all the stockholders would be necessary to pay the expenses of collection and the debts ascertained by the decree.

The amount would depend upon many contingencies, chief among which, and wholly "incalculable," was the element of the pecuniary condition of more than a thousand stockholders, scattered over the whole country. In fact, the assessment involved in this suit was itself merely tentative. Another assessment has been found necessary, owing to the insolvency of a large number of stockholders.

It was a case like that of which the Court speaks in Kennedy vs. Gibson, 8 Wallace—

"The liability of the stockholders is several, not joint. The limit of the liability is the par of the stock held by each one.

When the whole amount is sought to be recovered, the proceeding must be at law. When less is required, the proceeding may be in equity; and, in such case, an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the Court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend, in part, upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases *cannot be foreseen.*"

The decree in this case was of the kind above described, so far as it reserved leave for the trustee or the creditors to apply for another assessment, and the result of the call could not be foreseen.

The Chancery Court, with all the information accessible to it, was unable to do more than attempt to approximate the necessary amount of the call to be made.

The *full amount* of the liability of each stockholder, as we have tried to show, is such as will suffice to pay the debts of the company. The call sued for is but a part of that amount.

The obligation to pay *anything* under the contract of the stockholder, as interpreted by this Court in the cases to which we have referred, is not a *contingent* liability, within the meaning of section 5068, R. S. The *obligation to pay* does not exist until the call is made. The *liability to be called upon to pay* is incurred by becoming a stockholder.

That liability may be said to have become certain at the time Sumner filed his petition in bankruptcy. But whether the *liability to be called upon* would ever ripen into a *liability to pay*, and if it should ripen into such a liability, *how much* must be paid, were matters as to which the Court in bankruptcy could make no calculation. As to this liability, the position of the

bankrupt was like that of the lessee, with reference to rent that accrues due after the bankruptcy. Future accruing rent is not a debt at all at the time of the bankruptcy, and cannot be proved.

Parke B. 5 Exch., 136.

Here there was no legal liability of any kind until the call was made, and this by the terms of the contract between the corporation and the bankrupt. When the call was made, it found the bankrupt in possession of the stock, with all that such possession implies.

We suppose that the bankrupt law has no application except to those cases in which the Court in bankruptcy can give relief to debtor and creditor.

The jurisdiction of a Court in bankruptcy is exclusive, and such a Court must be able to do full justice in all cases coming under its jurisdiction without depending upon the aid of other tribunals, and especially of other tribunals not subject to its control.

If then a question arises whether a claim against the estate of a bankrupt is *provable*, or capable of being *ascertained and liquidated*, under section 5068, R. S., that question can only be answered by an examination of the powers of the Court in bankruptcy to ascertain and liquidate the claim so as to make it capable of being proved.

If the bankrupt Court cannot do this, either because the claim itself is incapable in its very nature of being estimated or calculated, or because the bankruptcy Court has not the power or jurisdiction to do what is necessary to estimate or calculate the claim, such a claim cannot be provable under the law.

We submit that in this case, the Court in bankruptcy could not have calculated the amount to be proved, both because that amount depended upon contingencies that elude measurement even by approximation, and because the bankruptcy Court did not have jurisdiction over the company so as to be able to ascertain those facts without which the extent of the liability could not even be guessed at.

It would seem therefore that the bankrupt or his creditors could have successfully resisted the attempt of the company, or

of its assignees under the deed of trust, to prove against his estate any claim on account of his stock, except so much as had been called for by an equal assessment made by the company or by a Court of competent jurisdiction, upon the bankrupt and all his co-stockholders. Any other claim than that would not have been warranted by the contract of the bankrupt.

Until such a call has been made, the bankrupt cannot be guilty of a breach of his contract, and is not liable to any action on the part of the company or of the assignees under the deed of trust.

Whether such a call would ever be made, whether more than one would be made, and how much the call or calls would be, were matters wholly incapable of ascertainment until the affairs of the company had been wound up.

The subject has been passed upon by two of the State Courts, of high authority.

In Maryland—

Glenn vs. Howard, and Same vs. Savage, 65 Md. 40.

We respectfully refer the Court to the opinion in this case, as embodying a full statement of the law.

In Alabama—

Sayre vs. Glenn, Va. Law Journal, Vol. 13, No. 15, page 307.

We may also add that the learned Judge who decided this case below, subsequently upon full argument, decided that the discharge was not a bar, in a case heard in the Western District of Virginia.

We respectfully refer to the following cases in support of our view of the law:

In South Staffordshire Railway Company vs. Burnside, 5 Ex. 129, the defendant, a railway shareholder, became bankrupt on the 8th of February, 1848. On the 18th of same month a call was made, and subsequently other calls were made. On the 24th April, 1848, the defendant obtained his certificate. The scrip was handed over to the assignees, and some correspondence had relative to their value, and the propriety of selling the same

The shares, however, remained in the possession of the assignees; the Court held that although delivered to the assignees, the property in the shares continued in the bankrupt, and that the claim was not barred by his certificate inasmuch as it was not provable as a debt payable *in futuro*.

The Court say, Parke, B., (page 136): "Is this then a debt payable on a contingency under the 56th section? The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted. * * The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable after his certificate to the payment of rent accruing due, subsequently to the bankruptcy. The contract to pay rent in future is not a debt contracted at the time of the bankruptcy and could not be proved under the fiat against him. We may add that to make the bankrupt's estate pay a dividend, on the full amount of the sum subscribed for, when no other shareholders were yet required, nor sure to be required, to pay a call, would put him in a much worse situation than others, and would be obviously unjust."

In the case of The Amicable Insurance Company vs. Malone, 6 I. R. Eq., 272, the defendant filed his petition in bankruptcy in Febauary, 1868, and received his certificate in July of the same year. In November, 1870, the company was ordered to be wound up, and defendant's name was put on the list of contributories.

After saying that the title to the shares was still vested in the defendant by reason of the non-acceptance of them by his assignees in bankruptcy, the Court said (page 279): "The material sections of the Act of 1857 (20 and 21 Victoria, ch. 60) are the 257th and 258th. The one provides for a 'debt payable upon a contingency which shall not have happened before the filing of such petition' (in bankruptcy); the other for

the case of a contracted liability to pay money upon a contingency which shall not have happened and the demand in respect thereof shall not have been ascertained before the filing of such petition. Was the appellant's liability as a shareholder in the Amicable Company, at the time of his bankruptcy in February, 1868, such as to come under either of those definitions? What is the contract which is entered into by taking shares in a joint stock company? Simply to become a partner in a going concern; to share in its possible profits; to contribute to its possible losses. The last is a liability; but could it with any regard to appropriateness of language, be described as a 'debt payable upon a contingency,' or as, 'money payable upon a contingency'? Whether a call shall ever be made, and if so, how many, and when, and to what amounts, will depend upon the chances of the business—chances which constitute not a 'contingency,' but an aggregation of contingencies or rather of uncertainties incapable of being measured. * * * What both sections point to, are contingencies to pay sums ascertained or ascertainable, upon contingencies, specific and defined."

In Furdoonjee's case, L. R. 3 Ch. Div., 264, shares in an English Company were taken by Furdoonjee, a resident of India, in 1863, at Bombay. Furdoonjee became insolvent in October, 1866. In July, 1867, the company was ordered to be wound up. In October, 1868, Furdoonjee obtained an order of discharge under the Indian Act, and the question was, whether the shareholder, by reason of his bankruptcy, was discharged from being a contributory. The Court say, (page 267) Bacon, V. C.: "I do not see how the liability could have been a provable debt. What value could possibly have been set upon the liability at the commencement of these proceedings? Where are the shares at this moment? I do not see how the liability could have been a provable debt at the time when these insolvency proceedings commenced. There was no constat that there ever would be a call on the shares. I think the name of the shareholder must be placed on the list."

The case of the Financial Corporation vs. Lawrence, Law Rep., 4 C. P., 731, is a case well in point. Lawrence being the holder of shares in the company, executed an inspector's deed. After

the execution of the deed, a call was made on his shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced. Byles J. (page 736) says: "At first sight this case seemed to present considerable difficulty, but it is now plain, both on principle and authority. It appears to me that the companies' Act, 1862, (25 and 26 Vict., C., 89,) sects. 74 and 75, only applies to cases where the winding up of the company has preceded the bankruptcy of the shareholder, or a deed which takes the place of a bankruptcy. Until the winding up of the company, the liability of the shareholder is not calculable. It not only depends upon a great variety of circumstances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may even be a source of gain. This case seems on principle, therefore to be similar to the case which has been cited of Mudge vs. Rowan, Law R. 3 Ex., 85. There, nobody could estimate the value of the contingency upon which the liability of the defendant depended at the date of the bankruptcy, and the Court of Exchequer therefore held that the debt was not provable."

"Applying the principle of that decision to the case now before us, it seems to me that the defendant's liability was not calculable till the winding up of the company had taken place, and that this debt, therefore, would not have been provable under a bankruptcy at the date of the deed." Upon the same point also, Montague Smith, J. says, (page 738): "As soon as the company begins to be wound up, the liability of the shareholders, which was not till then an existing obligation, is altered *by the statute* into a different species of liability; it is to be then a debt, and in England and Ireland a specialty debt, and it is to be deemed to have accrued at the time when the liability commenced, and to be payable when calls are made for enforcing such liability. I quite agree therefore, with all that my brother Byles has said, and that the plaintiffs' was not a liability which could have been proved in a bankruptcy on a petition filed at the date of the deed, *nor were they then creditors of the defendant*, and the claim of the plaintiffs does not therefore come within the terms of the deed, and there is nothing to prevent their proceedings in this action; and our judgment must be for the plaintiffs."

So in Riggin vs. McGwire, 15 Wall., 549, the plaintiff sued the defendant to recover damages for a breach of covenant. The defendant pleaded a discharge under the bankrupt Act of 1841. The facts were as follows: In December, 1839, Riggin conveyed certain land in Missouri to one Ellis, in fee, with words creating a covenant of indefeasible estate in fee. The property afterwards came regularly into the possession of McGwire who sold it in lots. In 1868, the purchasers were sued by one Mrs. Thomas, whose husband formerly owned the property, for the value of her dower that had never been relinquished and were obliged to pay it. McGwire thereupon brought this suit, and the question was whether Riggin was discharged from this demand by his discharge in bankruptcy in 1843. Upon this point the Court say, (page 551,) Bradley, J.: "It is argued that under the right given by the fifth section of the Bankrupt Act of 1841, to prove 'uncertain and contingent demands,' the claim in this case could have been proven under the Act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Act of 1841."

In Peirce vs. Wilcox, 40 Ind., 70, the complaint states that James Peirce, the appellant, on September 23d, 1858, executed a mortgage to one R. H. Wilcox, appellee, conveying certain lands to secure appellee on notes to the Ohio Insurance Company made by appellant; that appellant failed to pay said notes, and judgment was recovered on the same against appellant as principal, and appellee as surety; appellee was compelled to pay $2,000.00, and then assigned his claim against appellant to one M. M. Wilcox, who obtained judgment in 1866 for the full amount of the claim.

Before the commencement of this action M. M. Wilcox, assigned his judgment to appellee. The prayer was for a judgment and foreclosure of the mortgage. The defendant Peirce, pleaded a discharge in bankruptcy granted in 1869, and that the real estate was exempt, not being worth more than 200 dollars. The Court say, (page 75): "It is conceded that the mortgaged property was not sold, released or delivered up. In such a case

the appellee could not have proved any part of his debt; and as under section 34 of said Act, the bankrupt is only discharged from such debts, claims, liabilities and demands as were or might have been proved against his estate in bankruptcy, the discharge constitutes no defense to the action. In our opinion the discharge in bankruptcy constituted no defense to the action to foreclose the mortgage."

So in Robinson vs. Pesant, 53 N. Y. 419. The action was brought to foreclose the plaintiff's lien as warehousemen, for the storage of a caloric engine and machinery, and for a personal judgment for any deficiency that might remain after the sale of the property. The property was delivered to plaintiff to be stored in 1865, for a reasonable compensation. The defendant pleaded in bar his discharge in bankruptcy, obtained in December, 1867. The Court say upon this point, (page 421): "The bankrupt discharge is by the terms of the Bankrupt Act and of the discharge itself, limited in its operation to those debts and claims, which, by the Act, are made provable against the estate of the bankrupt, and which existed at the time of the filing of the petition. It does not operate upon continuing contracts so as to permit the bankrupt to enjoy the benefits arising therefrom after the filing of his petition, and at the same time exempt him from liability for such subsequent enjoyment."

In Greenville and Columbia Rail Road Company vs. Maffett, 8 S. C., (Rich. 1876,) 307, an action was brought by the company to recover a certain indebtedness of one Maffett, their agent, from David Kibler, a surety for the former. Kibler pleaded a discharge in bankruptcy granted in 1868, the indebtedness of Maffett accruing from month to month as far back as 1866, until 1872, the time of his removal. The Court below sustained the report of the master, finding the amount due at the time of the bankruptcy and discharged him from this amount; but as to the portion of the indebtedness accruing after the discharge gave judgment against Kibler. Moses, C. J., says, (page 315): It is laid down both in James and Bump, the latter at page 232, referring to the authorities so deciding : "That a certificate of discharge is a bar only to debts and demands, which were or might have been proved, but not as against personal covenants and

engagements which were not provable. If a demand is not provable, it is not barred by the certificate."

In the case of Jacobson vs. Horne, 52 Miss. 185, Horne interposed his claim to some corn which had been seized under an attachment against one Mason. Plaintiffs in error became sureties on his bond on condition that he would turn over the corn to them. Horne delivered the corn to them to be held by them as indemnity against loss by reason of the suretyship until they should be released from all liability on the bond, and then they were to account to Horne for it. In May, 1872, plaintiffs in error were adjudicated bankrupts, and in December, 1872, were discharged as such. In May, 1873, the attachment was dismissed and plaintiffs in error were released from liability on the bond. Horne afterwards called on them to account for the corn. They refused, and he sued them for the value. They pleaded the general issue and discharge in bankruptcy. The Court said: "The debt was not provable under the bankrupt law, and therefore was not discharged by the discharge of plaintiffs in error. Its existence was contingent on an event which did not occur until after the discharge in bankruptcy of the debtors. Horne had no claim on them of any sort for the corn, or its value, until after they had been released from liability as sureties on his bond. Until then it was uncertain and could not be determined whether or not he would ever have any claim or demand against them, under the contract, about the corn. It was held without liability until the release of the bailees of it from the claimant's bond, and that did not occur until some time after the discharge in bankruptcy."

In U. S. vs. Rob Roy, 13 Bankruptcy Reg., 235, a decree had been rendered in favor of U. S. upon a libel, and the question to be decided was whether the claimant was discharged from liability on the bond for the re-delivery of the property seized, by reason of his having been discharged in bankruptcy. His discharge was dated June 30th, 1869, and purported to be a discharge from all debts due by him which existed on June 1st, 1868. The Court (Bradley, J.) held that this debt was not provable under the bankruptcy, because "the contingency on which the liability in this case was depending was the final decision of the (libel) case, which could not be known, anticipated or valued

by any method of discount or any calculation of probabilities or chances whatever. That decision was not made till the present term of the Court."

Warburg vs. Tucker, 85 E. C. L. 384, arose in 1858, and was a most important case. Defendant being indebted to the plaintiff, assigned to him as security an insurance on the defendant's life and an insurance on the life of the defendant's wife, (1) to pay the premiums; (2) that if he did not pay them, plaintiff might pay them, and defendant would repay plaintiff. Plaintiff sued defendant on this covenant, assigning as breaches of covenant, (1) that the defendant had not paid the premium; (2) that the defendant had not paid to plaintiff premiums paid by plaintiff in defendant's default. Defendant, to the whole declaration, pleaded his bankruptcy and certificate, avowing that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place. Held by the Queen's Bench, on demurrer to the plea, that the plea gave no answer to the declaration, neither of the plaintiff's claims being a debt payable upon a contingency, within section 177 of the bankrupt law consolidation act 1849, (12 and 13 Vict. C. 106,) nor a liability to pay money on a contingency, within section 178.

Lord Campbell, C. J., in delivering the judgment of the Court, said that successive bankrupt acts had progressively increased the classes of demands to which a certificate under a bankruptcy is a discharge, and that the framer of the last act seemed to have wished that the certificate should be a bar to all liabilities whatsoever arising before the bankruptcy, however great the difficulty might be in enabling those who had or might have contingent or unliquidated claims upon him to come in under the bankruptcy and prove the probable value of their claims at the time of the bankruptcy, and receive along with other creditors a proportional dividend; that a considerable progress had been made in extending the protection of the certificate to antecedent demands; but the object did not seem to the Court to be completely effectuated, and that the liability in respect to which the action was brought, still remained undischarged. His lordshsp said: "The statute speaks of 'a liability' contracted by a bankrupt to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before

the filing of the petition in bankruptcy. * * * * * But we do not think that provision is made by the section for a case like this, where there are to be successive payments on successive contingencies, during the whole lives of two individuals and the life of the survivor. The plaintiff, in seeking a remedy under the fiat, must first have made a claim for such sum as the Court should think fit. It is difficult to say on what principle the Court could proceed in fixing this sum. But supposing a sum to be fixed, insuperable difficulties present themselves before the plaintiff could be entitled to receive dividends with other creditors. The successive contingencies here, on which the defendant becomes liable in consequence of the breach of the covenant, are the non-payment by the defendant of the annual payment of the premium from year to year on each of the three policies, the plaintiffs paying these premiums or reinsuring after the policies were forfeited, and the plaintiff making a demand upon the defendant for the amount of the money so advanced. But the section seems to contemplate only the happening of one contingency, whereupon the whole demand in respect to the liability shall be ascertained. * * * * The section seems to contemplate and make provision only for one demand, depending upon the happening of one contingency."

This case, after elaborate argument and consideration, was affirmed on appeal in the Exchequer Chamber, 96 E. C. L. 904.

See also on the said section 178 of the Act of 1849, *Young vs. Winter*, 81 E. C. L. 399; *Maples vs. Pepper*, 86 E. C. L. 177, and *Cary vs. Dawson*, L. R., 4 Q. B. 568.

By the Bankrupt Law Consolidation Act, 1849, (12 and 13 Vict., c. 106,) section 177, "If a bankrupt, before the issuing of the fiat or the filing of any petition, had contracted any *debt*, payable upon a contingency which had not happened before such fiat or filing of such petition, the creditor might apply to the Court to get a value upon the debt, and the Court was to ascertain the value, and admit the creditor to prove the amount so ascertained, and to receive dividends thereon, or if such value had not been so ascertained before the contingency had happened, then the creditor might, after the contingency had happened, prove in respect of the debt, and receive dividends thereon with the other

creditors, not disturbing former dividends, provided he had not notice, when the debt was contracted, of an act of bankruptcy having been committed by the bankrupt." (This section was similar to section 56 of 6 Geo. 4, chapter 16, repealed by the above Act.)

By section 178: "If any trader, before the filing of any petition in bankruptcy, had contracted *a liability* to pay money upon a contingency which had not happened, and the demand in respect thereof had not been ascertained before the filing of the petition, if such liability was not provable under the Act, the person with whom such liability had been contracted should be admitted to claim for such sum as the Court should think fit; after the contingency had happened, and the demand in respect of such liability ascertained, he should be admitted to prove such demands and receive dividends with other creditors, and so far as practicable as if the contingency had happened and the demand had been ascertained before the petition, but not disturbing former dividends, provided the creditor had not notice of any act of bankruptcy at the time of contracting the liability."

Betterley vs. Stainsby, L. R., 2 C. P. 568 (1868), arose on the above section 178 of the Act of 1849. A. being indebted to B., transferred to him, as a security for the debt, certain shares in a mine conducted on the cost-book system, and covenanted with B. to indemnify him from all manner of charges, liabilities and costs that might accrue in respect of the shares. A. became bankrupt in 1855, and B. having been compelled, as a shareholder, to pay certain debts of the company, which had accrued before A's bankruptcy, sued A. on his covenant of indemnity. Willes, J., page 571–2, said: "The case does not fall within the one hundred and seventy-eighth section, because the covenant is to indemnify the plaintiff against debts, the plaintiff's liabilty to which depends upon several contingencies, as whether the company is solvent or not; whether the plaintiff is selected to pay or not; whether the other shareholders are able to contribute in whole or in part. * * * Such a liability is not within the Act, because it is not a liability to pay money, nor is the contingency such a one as is contemplated by the Act. I find it impossible to distinguish this case from *Warburg vs. Tucker*, 5 E. & B. 384 (E. C. L. R. Vol. 85); E. B. & E. 914 (E. C. L. R.

Vol. 96); 24 L. J. Q. B. 317; 28 L. J. Q. B. 56." Keating, J., said: "I am of the same opinion. It is well established that the 178th section only applies where there is a liability to pay money on the happening of a single contingency. Here it is not a liability to pay money, and the liability is dependent on a series of contingency, which have already been adverted to by my brother, Willes. I think that our present judgment is entirely in accordance with the principles laid down in *Warburg vs. Tucker*, 5 E. & B. 384 (E. C. L. R. Vol. 85); E. B. & E. 914 (E. C. L. R. Vol. 96); 24 L. J. Q. B. 317; 28 L. J. Q. B. 56, and which have been affirmed by the Exchequer Chamber and the House of Lords."

The General Discount Company vs. Stokes arose in 1864, upon said section 178, Act 1849, and is reported in 112 E. C. L. 765, and somewhat differently in 34 L. J. N. S. C. P. 25, and in 10 Jurist N. S. 1205. The subject was much considered, and each judge delivered an opinion. In 112 E. C. L. 772, Erle, C. J., is reported to have said: "Where a party is a holder of shares in a joint stock company, his liability to pay money depends upon more contingencies than one"; and he proceeds to consider the question upon some of the authorities. In 34 L. I. 27, Erle, C. J., is reported to have said: "His (the shareholder's) liability to pay must depend upon more than one contingency, and no liability attaches which is dependent on a single contingency, which is required to bring it within 178th section." In 10 Jurist, 1205, he is reported to have said: "The question is, whether the liability to pay this call was a liability upon a contingency? At first sight I certainly thought that it was, but on referring to the authorities I have come to a different conclusion. The bankrupt continues to hold shares upon which calls may be made. There are, in fact, more contingencies than one. There is no particular contingency. This view is supported by the authorities." On page 1206 Byles, J., said: "I am of the same opinion. At first sight these calls appeared to fall within a contingency provided for by the 178th section of 11th and 12th Vic. C. 106; but on reference to the authorities we find that that section applies where there is one, but not as in this case several, contingencies." And to the same effect he is reported more fully in the other reports of the cases. Keating, J., concurred.

In *Metcalf vs. Hansom*, L. R., 1 Eng. and Irish App. Cases, 242, it was held by the House of Lords, under the same 178th section of the Act of 1849, that "the statute contemplated only one single liability arising upon one contingency, and that cannot apply to a liability to make periodical payments." To the same effect was *Ex parte Wiseman, In re Kelsom, Tritton & Co.*, L. R. 7 Ch. App. Cas. 35, before the Lord Chancellor and the Court of Appeals in chancery. That case arose under the same section of the Act of 1849. On page 43 the Court said, by Sir G. Mellish, L. J.: "The contract appears to us not to be a contract to be performed once for all upon the happening of a single contingency, but to be a contract which was liable to be broken repeatedly at different times upon the happening of various contingencies, while separate damages could be recovered under each such breach. We are of opinion that *Warburg vs. Tucker, Metcalf vs. Hansom, Carey vs. Dawson*, and *Betterly vs. Stainsby* are decisive authorities that the liability of a bankrupt under such a contract is not within the 178th section of the Act of 1849." All, in fact, of the foregoing decisions arose under the said section 178 or the provisions of section 177 of the Act of 1849, or under both of said sections.

Mudge vs. Rowan, L. R. 3 Exchcq. 84, arose under 175th section of the said Act and the 154th section of the Act of 1861 (24 and 25 Vict. C., 34,) in respect to annuities, and was a case in which it was held to be impossible to estimate the value of the liability dependent upon the happening of a single contingency. By a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future combination by mutual consent, and it was held that the value of the contingency was not susceptible of calculation.

So in *Parker vs. Ince*, which arose under the said 175, 177 and 178 sections of the Act of 1849, by a deed of separation between the defendant and his wife, the defendant covenanted with the plaintiff that he would, every year during the joint lives of his wife and himself, pay to the plaintiff, as a trustee for her, to her separate use, such a sum as, with the dividends and interest or other income to arise from £948 6s. 4d. bank 3 per cent. annuities, or from other funds settled or which might be

settled to her separate use and which might be received by her, would make one clear annuity or yearly sum of £200, such annuity to commence from the 11th of January, 1854, and to be paid by four even and quarterly payments; provided that if the defendant and his wife should at any time thereafter cohabit as man and wife, that then and from thenceforth the said annuity should cease. On the 29th of September, 1854, and while the defendant and his wife still continued to live separate, the defendant became bankrupt. Held, that the annual sum, so warranted to be paid by the defendant for the separate use of his wife, was not an "annuity," within the 175th section of the Bankrupt Law Consolidation Act, 1849, nor a "debt payable on a contingency" within the 177th section, or a "liability to pay money upon a contingency" within the 178th section; and consequently, the certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy. It was thus held that the covenant was not to pay an annuity *simpliciter*, but a sum of money to be made up to an annuity of a certain value, after taking a variety of circumstances into account, and it was that which was treated by the Court as the insuperable element of uncertainty. *Cory vs. Dawson*, L. R., 4 Q. B. 567 (*supra*,) was also a case arising under the 178th section of the Act of 1849, and the 154th section of the Act of 1861, in which it was held that the liability, dependant upon a contingency, the value of which was not capable of being ascertained, and which, therefore, was not provable in bankruptcy. *Borett vs. Jackson*, 4 L. R., C. P. 259, arising under the 175th section of the Act of 1849, and section 192 of the Act of 1861, and was a case in which the value of the annuity depended upon the number of contingencies, and it was held to be incapable of being ascertained by valuation. Montague Smith, J., said, page 267: "A contingency, depending upon a life or lives, is clearly ascertainable in point of value, there being well known data by which to value it. But here there are no definite materials."

The case of the *Amicable Insurance Company vs. Malone*, arose under sections 257 and 258 of the Act of 1857, (20 and 21 Vict., Ch. 60.) The first of these sections provides for the proof of a "*debt* payable upon a contingency, which shall not happen before the filing of the petition" in bankruptcy; and the second

provides the case of a "contracted *liability* to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition." Malone was a registered shareholder in a company, became bankrupt, and obtained a certificate of discharge in July, 1868. In November, 1870, the company was ordered to be wound up, his name being on the register of shareholders, his assignees in bankruptcy not having accepted his shares: *Held*, that notwithstanding his bankruptcy and certificate of discharge, he was still liable upon the shares, and that his name was rightly put upon the list of contributories.

In re Am. Ins. Co., 6 Irish Eq. R., 272, Ch. App.

We now come to a different, but even stronger class of cases—namely, those which have arisen under section 75 of the Companies Act, 1862, (25 and 26 Vic. C. 89)—which is as follows: "The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt, (in England and Ireland, of the nature of a specialty,) accruing due from such persons at the time when his liability commenced, but payable at the time, or respective times, when calls are made as hereinafter mentioned for enforcing such liability; *and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made.*" Here was direct authority conferred to prove the "estimated" value of a bankrupt's liability to future calls, and the Act was obviously intended to be auxiliary of the jurisdiction of the bankruptcy Court, under the existing Bankruptcy Acts. And yet, notwithstanding said section of the Companies Act, it has been uniformly held that such liability is not provable in cases in which the bankruptcy takes place before the company has begun to be wound up under the provisions of the Act. And an examination of that Act will show that stringent provisions were made for the summary convention of all of the creditors, and of all of the shareholders, *and of the debtors of the company* before the Court, with the view of expediting and facilitating such an "estimate" as it was possible to make of the value of such liability. See sections 82, 83, 91, 95, 98, 99, 100,

101, 102, 105. And it has been held that the Court will reserve liberty to the assignee of a shareholder in bankruptcy to institute an inquiry, and to call upon the liquidator of the company to show in what way the estimate was arrived at.

Ex parte Gibbons, *Re* Clarke, 11 L. T.; U. S., 752, Bank.

Cox's Law of Joint Stock Companies, 149.

Martin's Anchor Company vs. Morton, Same vs. Hewett, L. R., 3 Q. B., 305, arose in February, 1868, under section 154 of the Bankruptcy Act of 1861, and the said section 75 of the Companies Act of 1862. The counsel for the bankrupt (Brown, Q. C.,) said, page 307: "It must be conceded that under the former Bankruptcy Acts, 6 Geo. 4, ch. 16, sections 51, 56, and 12 and 13 Vic., ch. 106, section 178, the cases have decided that calls are not provable, either as a debt, provable *in futuro*, or as a debt due upon a contingency. *South Staff. Railway Co. vs. Burnside*, 5 Exchcq., 129; *General Discount Co. vs. Stokes*, 112 E. C. L., 765, But the intention of the Bankruptcy Act of 1861 (24 and 25 Vic., ch. 134,) was to clear the bankrupt from all future liabilities existing at the time of the Bankruptcy. * * * Section 154 meets the case of liability to pay future calls, as it provides for liabilities by reason of any contract or promise to pay premiums upon any policy of insurance, *or any other sums of money, whether yearly or otherwise.*"

But the Court held differently. Blackburn, J., said that the section "clearly contemplated only a contract to make periodical payments, ascertained at the time of a contract, and the liability to pay calls, if made, can never be said to be a contract to pay sums, yearly or otherwise, analagous to the premiums on a policy of insurance. The Legislature, therefore, appears to me not to have said that the present value of the calls shall always be ascertained; indeed, it would be impossible to do it, as the amount and period at which they are to be paid would be uncertain." Lush, J. said: "The first part of section 75 applies to all shareholders, and says that the liability as a contributory shall be deemed a debt accruing due when he first becomes a contributory, but not payable till the calls are made. The section then goes on to say what is to be done in the case of a bankruptcy of

a contributory. The argument of the defendant requires the language of the section to be altered, or at any rate to be read as if it said: It shall be lawful in the case of any contributory who has at any time been bankrupt and obtained his discharge, to prove against his estate the estimated value of his liability to future calls. But such a provision would be perfectly absurd; how could there be any proof against an estate already administered, and against a man who has become *sui juris?* Then, as to the defence attempted to be raised by section 154 of the Bankruptcy Act 1861; that section does not apply to any such case as this. No doubt by section 16 of the Companies Act, 1862, the members of a company are in the same position as if they had covenanted to pay any call which may be made while they remain members. It has been decided that there is nothing in the Bankruptcy Act of 1849 extending to such a case, and as it seems to me section 154 of the Act of 1861 does not apply to any such covenant or contract to pay uncertain sums like this liability to pay calls, but is confined to cases where the bankrupt is under a liability to make certain periodical payments, such as premiums of insurance, and the like."

Hastie's Case, L. R. 7, Eq. 2, (November, 1868), arose upon the same act, and the whole matter was reconsidered by Lord Romily, M. R., and it was held that: "A member of a limited company, who has become bankrupt and obtained his discharge, and whose estate has been fully administered by the assignee, remains liable in the event of the company being subsequently wound up, to be made a contributory in respect of his shares not fully paid up, and is not exonerated under section 154 of the Bankruptcy Act, 1861, or section 75 of the Companies Act, 1862, unless the assignee has been substituted for him under section 77 of the Companies Act, and the assignee, if he does not elect to take the shares cannot be compelled to do so, or be made liable as a contributory."

On page 7 the Master of the Rolls, delivering the judgment of the Court, said: "It is quite settled by *South Staffordshire Railway Company vs. Burnside*, 5 Ex. 129, and *General Discount Co. vs. Stokes*, 17 C. B. N. S. 765, (E. C. L. R. vol. 112), that under the prior bankruptcy Acts, future calls were not provable

either as a debt payable *in futuro*, or as a debt due on a contingency." And he proceeded to show that the acts in question did not effect a change in the law. On appeal, this case was affirmed. L. R. 4 Ch. App. Cases, 274.

On page 278, Sir G. M. Gifford, L. J., delivering the judgment of the Court, said: "It is essential for proof, under 154th section of the Bankruptcy Act, that the debt to be proved should be a debt capable of valuation at the date of the bankruptcy. The provisions of the Act of 1862 do not make a debt provable which is incapable of valuation at the date of the bankruptcy; nor can such a construction be in reason put upon them as would have the effect of relieving a bankrupt in consequence of his discharge, though he should have been discharged years before the winding up, and might have been holding the shares, and even receiving dividends, subsequently to his discharge. There is nothing in this case to show that the debt or call in respect of which the bankrupt is made a contributory was capable of valuation at the date of his bankruptcy. *Prima facie* undoubtedly it would not be so; and as the bankrupt is discharged only from debts provable under his bankruptcy, and those debts only are provable which were capable of valuation at the date of the bank ruptcy, we are of opinion that he must be retained as a contributory."

The next case upon these Acts is the *Financial Corporation vs. Lawrence*, L. R., 4 C. P. 731, which arose in June, 1869, where the cases are reviewed alike by counsel and Court. "A being the holder of shares in a company, executed an inspectorship deed. After the execution of the deed, a call was made on A.'s shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced—Held: That the call was not barred by the deed." Byles, J., (page 735,) said: "It appears to me that the Companies Act, 1862, (25 and 26 Viet. C. 89,) sections 74 and 75, only applied to cases where the winding up of the company has preceded the bankruptcy of the shareholder, or a deed which takes the place of a bankruptcy. Until the winding up of the company the liability of the shareholder is not calculable. It not only depends on a grant variety of circum-

stances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may even be a source of gain.

"This case seems on principle, therefore, to be similar to the case which has been cited of *Mudge vs. Rowan*, Law Rep. 3, Ex. 85. There nobody could estimate the value of the contingency upon which the liability of the defendant depended at the date of the bankruptcy, and the Court of Exchequer, therefore, held that the debt was not provable. Applying the principle of that decision to the case now before us, it seems to me that the defendant's liability was not calculable till the winding up of the company had taken place, and that this debt, therefore, would not have been provable under a bankruptcy as the date of the deed." Montague Smith, J., was of the same opinion, and cited with approval *Martin's Patent Anchor Co. vs. Morton*, L. R., 3 Q. B. 306, and *Hastie's Case*, *supra*.

The whole scope of the above and other English decisions in respect to the provability in bankruptcy under the English Acts above mentioned of contingent debts and liabilities, is well given in an elaborate opinion rendered upon the said section of our Bankrupt Act of 1867, by the Supreme Court of New Jersey in *Heywood vs. Shreeve*, 44 N. J. L. R. 94: "Judgment was entered for the penalty on a bond conditioned for the payment of an annuity during the life of the annuitant; the obligor subsequently became bankrupt, and was discharged in bankruptcy. Held, that the judgment was provable in bankruptcy with respect to all payments of the annuity to become due after the adjudication in bankruptcy, on a valuation thereof, as a contingent liability contracted by the bankrupt within the meaning of section 5068 of the United States Bankrupt Act of 1867, and that the liability of the bankrupt under the judgment was discharged by his discharge in bankruptcy." That decision is undoubtedly correct, as the liability depended upon only one contingency, the value of which was easily calculable by reference to tables of longevity. The learned Court indeed said that it knew no case of the kind, while it may have found one to its purpose *In re* English and Jr. Ch., &c., Society, 1 H. & M. 79. But, in that event, we might have been deprived of a most able and exhaus-

tive historical account and consideration of the English Acts in respect to annuities and contingent liabilities.

On pages 101–2, in speaking of said section 5068, the Court said: "The language is, 'in all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for,' evincing clearly a purpose to embrace all debts and liabilities such as would be included within the generality of the description, which had not otherwise been provided for. The succeeding paragraph in the same section suggests the only limitation on the generality of these words: the debt or liability must be such as that its present value can be ascertained.

"There is a class of cases in which contracts and liabilities within the letter of the bankrupt law, have been excluded from proof, on the ground that they were subject to contingencies of the value of which the statute had not provided the means of making an estimate.

Brett vs. Jackson L. R., 4 C. P. 259.
Cary vs. Dawson, L. R. 4, Q. B. 568.
Mudge vs. Rowan, L. R. 3. Exch. 85.
Hastie's Case, L. R. 4, Ch. App. 274.
In re Foster, 9 C. B. 422.
Kent vs. Thomas, L. R. 5. Exch. 312.
Overseers of St. Martin vs. Warren, 1 B. & Ald. 491.
Parker vs. Ince, 4 H. & N. 52.
Marchman vs. Brookes, 2 H. & C. 907.
Riggin vs. Magwire, 15 Wall. 549.
Robinson vs. Pesant, 53 N. Y. 419.
Woodward vs. Herbert, 24 Me. 358.
Loring vs. Kendall, 1 Gray, 305.
French vs. Morse, 2 *Id.* 111.

"Illustrations of this class of cases are actions on a covenant for title when the breach is the *inchoate* right of dower of a wife whose husband is still living, or on an official bond when there has been no breach before the bankruptcy proceedings. Such obligations have been held not to be provable against the bank-

rupt's estate, and not discharged by his certificate, for the reason that it was uncertain whether any breach would ever occur, and there was no method of estimating the value of the contingency on which they depended.

Riggin vs. Magwire, supra.
Loring vs. Kendall, supra.

"The principle on which cases of this class were decided will explain the English decisions upon sections 178 of 12 and 13 Vict. ch. 106. That section provides for a claim against the bankrupt's estate, where he had, before the filing of his petition, contracted to pay money upon a contingency which had not happened before petition filed. In *Warburg vs. Tucker*, 5 E. & B. 384; *S. C.* in error, E., B. and E. 914; and in *Metcalf vs. Hanson*, L. R., 1 H. of L. Cas. 242, it was held that a covenant to pay annual premiums, on a life policy which had been assigned to the covenantee as security for money loaned, was not 'a liability to pay money upon a contingency' within the meaning of this section. An examination of these cases will disclose that they were decided on the ground, as was said by Lord Campbell in 5 E. and B. 395, 'that the machinery provided for admitting a claim and proof under this section is wholly inapplicable to such a demand;' and by Lord Chancellor Cranworth (L. R., 1 H. of L. Cas. 250,) that in the statute there was 'no power to enable the creditor to make a claim for the aggregate of all payments; *i. e.*, to treat his demand substantially as one in the nature of an annuity, or, as if there had been only one contingency.'

"An inspection of this section will show that these decisions were well grounded in the absence of the means of estimating the value of such contingent liabilities."

CHARLES MARSHALL,
JOHN HOWARD,
For Plaintiff in Error.

FILED.
NOV 5 1889
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 67.

JOHN GLENN, TRUSTEE, *vs.* THOMAS J. SUMNER.

BRIEF FOR SUMNER.

This was an action brought December 7, 1883, by the plaintiff, as trustee, to recover a call for 30 per cent. of a subscription, payable on call, made by the defendant November 1, 1865, for 250 shares of stock in a proposed express company chartered by the State of Virginia.

The call was made by a decree in a court of equity of Virginia December 14, 1880, in a suit begun December 4, 1871, to enforce an assignment by the express company in favor of its creditors September 20, 1866.

The pleadings below were according to the North Carolina Code—*i. e.*, by complaint and answer.

To the complaint, the substance of which is as above, the defendant answered (1), upon information and belief (folios 11 and 12), that he did not subscribe for 250, but for only 50, shares in the company mentioned; (2 and 3) that he was protected by two different statutes of limitation and (4) also by a discharge in bankruptcy (folio 14).

There was no formal replication to the *new matter* alleged in the answer; but, as the parties went to a jury, it is to be conceded probably that such issues were duly taken.

The jury found "all issues in favor of defendant." (Folio 17.)

The bill of exceptions disregards the state of the record as to the issues and finding, and confines itself to the instructions of the court upon the defense of *bankruptcy*. It does not set forth all the evidence given in the case, and admits that no error was committed at the trial upon any issue other than that as to the effect of the defendant's discharge as a bankrupt.

However, if the suit were properly barred by some *statute of limitations* it seems not to be material that the court erred in ruling in substance that although the jury should find *against* the defendant upon that issue, nevertheless he was protected by the *discharge*.

For, as it has turned out, the actual finding upon the statute has rendered the instruction upon the discharge immaterial.

A similar remark is pertinent to the finding that the defendant had subscribed for *50* shares of stock. For in that case an erroneous ruling of the court below upon some matter *distinct from that* cannot be reviewed in this Court. The value in controversy—*i. e.*, betwixt a judgment for what the record shows that upon this issue the plaintiff must have been contented with (viz., 30 per cent. of $5,000) and the judgment actually rendered—does not authorize a writ of error.

In Moores *vs.* Bank, 104 U. S., 625, 630, there were three issues of fact, either of which would have warranted a gen-

eral finding for the defendant. The *bill of exceptions* stated that "the court [a jury having been waived] found for the defendant;" and the statement in the *record* was that "upon the *issue* joined" the court found "the *issues*" in favor of the defendant. Thereupon it was held that the record was too "ambiguous" to enlarge the effect of the general finding stated in the bill, that general finding meaning, in point of law, no more than that *one* of the issues had been so found. As a consequence error in an instruction upon one of the issues required the judgment thereupon to be reversed.

There is no such ambiguity here. The record states (folio 17) that the "following jurors, . . . being chosen to speak the truth of and concerning the *issues* submitted and joined between the parties in this action, for their verdict say that they find *all issues* in favor of defendant." Upon the same matter the bill of exceptions is as follows: "The answer shows the *defenses* set up, which include the plea of his discharge in bankruptcy, in bar of recovery. The plaintiff contended that it was not a provable debt at the time of filing of petition in bankruptcy. The court held that it was a provable debt, and that discharge barred it, and so instructed the jury. Verdict for defendant."

In the cases cited upon this point in the brief of the learned counsel for the plaintiff in error from 5 Wall., 795, 16 *ib.*, 577, and 17 *ib.*, 630, the error alleged was in admitting evidence, not upon one of several distinct issues, but upon the whole case, it being suggested, *per contra*, that inasmuch as such evidence had really worked no injury no error had been committed. It is in such cases as these that courts of error required to be assured *beyond all doubt* that no injury has been done before it will affirm the judgments.

See also Railroad *vs.* O'Brien, 119 U. S., 99; Gilmer *vs.* Higley, 110 U. S., 47, 50.

In Morisey *vs.* Bunting, 1 Dev., 3 (N. C.), it was held that if *non detinet* and the *statute of limitations* were pleaded and the jury "find all the issues in favor of the defendant" a court of error will not examine the correctness of the charge on the latter plea. So in Pierce *vs.* Myrick, *ib.*, 345, where the pleas were "not guilty" and "justification" and the jury found "all issues in favor of the defendant and the defendant not guilty," it was held that the rejection of testimony pertinent to the latter issue only was not ground for a new trial.

Apropos of the criticism of the learned judge who gave the opinion in that case upon the form of the finding ("all issues in favor of the defendant"), which seems to have occurred to him subsequently to the decision in the case preceding, the North Carolina Code allows the jury *to pronounce a verdict generally upon all the issues.* Sec. 232.

In case, however, it shall be considered that the error alleged is one which affected the whole trial below, it is submitted that the circuit court was right in holding that the debt due by the defendant upon his subscription was a provable debt at the time of filing his petition in bankruptcy.

Upon this matter the short facts are that the subscription was made in 1865; that shortly afterwards the defendant's right thereunder to stock was *bona fide* assigned, the assignee being immediately accepted by the company as a stockholder in lieu of the assignor; that in 1866 the company executed a deed in trust in favor of its creditors; in 1871 a bill was filed to enforce that trust; in 1875 the defendant

went into voluntary bankruptcy and in 1879 was discharged, and finally, in December, 1880, the call was made.

Whilst under the Virginia statute the assignment by the defendant of the stock did not affect his liability to calls upon the unpaid subscription, no question is made by the plaintiff directly that such assignment divested him of all beneficial interest in such stock.

I say "that no question was made *directly*," because suggestions in the brief of my learned friends in connection with "*damnosa hereditas*" (brief, p. 9, bot.) and at other points are to the effect that when Mr. Sumner went into bankruptcy he still owned the stock, and that his assignee in bankruptcy was thereby in peril of himself becoming its owner and by consequence of a personal liability upon the unpaid subscription.

But the record shows that Mr. Sumner had sold that stock in good faith some ten years before his bankruptcy to a solvent person who had applied for it, and who thereupon took upon himself, by consent of the company, the status of stockholder.

Therefore whether the debt due by Sumner was provable is a question wholly unaffected by apprehensions of the sort suggested upon behalf of the plaintiff in the interest of the assignee in bankruptcy.

Indeed, if it were important it seems that it might be maintained that such apprehensions are not substantial in any case.

The theory that an assignee in bankruptcy, merely by receiving officially an assignment of unpaid-for stock, becomes personally liable on calls thereabouts is a proposition that at this time of day needs more than an assumption or

an admission thereof in argument even by a court to make it probable. The doctrine to that effect in some of the old cases has gone down the horizon.

But even supposing the assignee in a fit case to have and to exercise a right to reject such an assignment, this throws no light upon the question whether the debt for such unpaid-for stock is not provable, for that debt is not like a charge upon land unaccompanied by a personal contract to pay, which shifts from shoulder to shoulder along with the land, and goes or stays as the latter does.

The Virginia statute, which makes assignors of unpaid-for stock responsible for calls, demonstrates that for subscriptions like the present. Therefore whether, by the policy of the statute of 1867, the estate of the bankrupt assignor be substituted in his place to the obligation for the stock depends upon other considerations.

In the present case those considerations are limited to unpaid and uncalled-for subscriptions for stock in companies which at the time of going into bankruptcy had ceased to be working companies and were in process of liquidation.

No suggestion need be made here that such subscriptions in a company which was working at the time of the bankruptcy are not provable, no matter how soon thereafter the company may cease to work.

The difference between the two cases is both substantial and clear. In the former the amount due upon the subscription is already fixed by the cessation of the company to do business, and requires only the action of a court for its ascertainment. All the data needed for such ascertainment are already in existence and only require to be brought together by evidence and arithmetic; therefore, by the well-known maxim, it is already certain. In the

latter case data for the required ascertainment are wanting—ex. gr., *there may never be a call, or if there be it may be for any amount conceivable, little or large.*

It is true that the COURT has pronounced that although upon the insolvency of a company having unpaid subscriptions due to it on call its creditors have a right at any time to compel a call by suit in court, yet that delay by these to bring such a suit is not delay within the statute of limitations as regards the secondary suits required to enforce the call if ordered. It is therefore admitted in the present suit that whether a court will order a call of unpaid subscriptions to the stock of an insolvent corporation is a contingency which requires to be ascertained before creditors concerned thereabouts can be considered as owing any legal duty of diligence to debtors upon the other side of that *concern;* but this contingency which intervenes betwixt the creditor and the duty to sue does not prevent him from proving the liability of the subscriber in bankruptcy. Indeed it seems to come directly within one provision by which the act of 1867, ch. 176, defines liabilities provable thereunder, viz., "contingent liabilities contracted by the bankrupt."

Section 19 of that act, after declaring provable—(1) *all debts due and payable at the time of adjudication in bankruptcy;* (2) *all debts then existing, but not payable until a future day;* (3) *all demands on account of goods and chattels wrongfully taken;* (4) *obligations as drawer, etc., where the liability shall not have become absolute until after the adjudication*—proceeds as follows: "*In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for the creditor may make claim therefor and have his claim allowed, with a right*

to share, if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained." (14 Stat., 526, top.)

Hereupon it is submitted that the *exposure* of a subscriber for stock in the National Express Company in the year 1875 to compulsion to pay his unpaid and uncalled for subscription was, within the above-quoted words, *a liability*, absolute, except for one contingency only, viz., *that call*, granting the latter to have then been, in legal parlance, no more than a contingency.

It is to be observed that contingent liabilities were provable, even in case where the final dividend might be ordered before the contingency had happened—*i. e.*, they were provable in cases where the creditor could not share in the estate, unless he should adopt the second alternative under that provision and have the present value of the liability ascertained and liquidated, and then proved for the amount so ascertained.

Upon the 25th day of August, 1875 (the day of the adjudication in bankruptcy) there had been pending at Richmond for nearly four years a bill of equity the object of which was to ascertain the amount of debts owed by the company in question, the whole of whose assets at that time practically consisted of some $3,200,000 due on account of stock unpaid for. Under that bill such debt was subsequently ascertained to be about $500,000.

In August, 1875, nothing had been done in the equity case since December 4th, 1871, and nothing more was done

afterwards until August 4th, 1879, when, upon a display of merely ordinary activity by the complainants therein, such proceedings were had that on the 19th day of June, 1880, a report was made of the indebtedness to the effect aforesaid, which report was in due course and without dispute confirmed and a call made in December, 1880. There is no reason for believing that the happy diligence, so begun in August, 1879, and ended sixteen months after, might not as well have been begun in August, 1875, to be terminated in December, 1876; and if this result was attainable by a Virginia court of Equity there is no reason for doubting that it might as easily have been accomplished in a Federal court of bankruptcy. *In the meantime, so far as Mr. Sumner was concerned, those proceedings were intended to ascertain the value of his debt for the subscription.* The circumstance that in a court of bankruptcy this ascertainment would have been the whole of the object of inquiry, or at least have been the chief object thereof—instead of one item in a multitude of such, as in the Virginia case—does not affect the question in point of theory, and therefore did not prevent the creditors or those who represented them from making proof of it, such proof to await a happening of the contingency before the final dividend, or to have its present value ascertained and liquidated.

Inasmuch as the British bankrupt acts of 1849, 1861, etc., were probably well considered by those who drew the act of 1867, decisions thereupon have a certain value for the settlement of questions upon the latter statute, although, from difference of wording and from the circumstance that the former have a context, in a vast congeries of legislation, upon companies and other commercial matters, which does

not exist in this country, such decisions are instructive only in a general sense.

In Discount Company *vs.* Stokes, 17 C. B. (N. S.), 765, a question arose whether, under the following circumstances, viz: Adjudication, November 3rd, 1860; discharge, February 4th, 1862; order to wind up company, May 14th, 1861; call by official liquidator, July 4th, 1861, the bankrupt, who had not paid his subscription for shares in that company, had been discharged therefrom, as being "*a liability to pay money upon a contingency which shall not have happened*," etc. (within the words of the act of 1849), before the filing of the petition. The court said that upon a first reading the words raised a presumption in favor of discharge, but upon further consideration it seemed that if such were the intention of the Legislature it had not been well expressed: "Where a party is holder of shares in a joint stock company his liability to pay money depends upon more contingencies than one; there may or may not be a call made and the bankrupt may not be the holder of the shares when the call is made. There may be no existing liability at the time of bankruptcy, but a liability may happen from the concurrence of those two contingencies." It is observable that one of the contingencies relied upon by the court for taking the case before them out of the provision made by the "very doubtful clause," for "a contingency" above, is not a contingency in the present case, even if the company here had been *working* at the time of Mr. Sumner's bankruptcy, inasmuch as he could not have gotten rid of his liability. However, the case turned upon the fact that the company there was a working company.

It will also be observed that Mr. Justice Byles, in his concurring opinion, as an objection to the discharge, gives weight to the view that the bankrupt *would hold his shares and yet be freed from all liability in respect of calls, past and future.* And so, in strong language ("a monstrous injustice") does Mr. Justice Blackburn, in Anchor Company *vs.* Morton, 3 Q. B., L. R., 306, 311. This objection applies, of course, only to stock in working companies, the present case being *doubly* free from such objection; inasmuch as the company had ceased to be a working one at the time of bankruptcy, and Mr. Sumner also had long before *bona fide* assigned his stock.

"Contributory" is a technical statutory word in England, which often occurs in the later reports. As is well known, after the commencement of the winding up of a company under statutes for that purpose, one who up to that time has been a shareholder in debt to the company becomes a *contributory.* The British bankruptcy acts make liability for unpaid stock by a person who at the commencement or during the continuance of the proceedings in bankruptcy is a contributory, *provable* on the ground that the value of his liability has at that time become ascertainable. Whilst we have here no such technical word as "contributory," yet obviously Mr. Sumner became such substantially after the assignment in 1866, or at all events after the filing of the bill in equity in 1871.

Arguments from the English statutes and cases upon *contributories* are of course applicable to American statutes dealing with persons in the same situation, although not known to our law by the same name, or by any name, in any other way than by description.

In the case entitled Land Credit Company of Ireland, L.

R., 6 Ch. Ap., 582, one McEwen had been a stockholder in the company, but in 1864 had assigned his shares. In 1865 a winding-up order was made. In 1866 McEwen went into bankruptcy, and was discharged in 1867. In 1868 a large debt which for several years had been in litigation was allowed against the company, and thereupon a call was made upon McEwen, who, as being a *past* stockholder, had been placed upon a list of contributories known as the "*B list*," calls upon existing stockholders ("*A list*") not having been sufficient to satisfy liabilities. The master of the rolls held McEwen's debt to be not provable; but this was reversed by the Lord Justices, who said:

"In the present case the debts of the company were supposed at the commencement of the winding up to be very inconsiderable; but a claim was made against the company by Overend, Gurney & Co. for £230,000; and after a litigation which lasted several years the claim was held to be valid. * * * It is quite clear that the extent of the liability of the contributories in class A depended upon the determination of the claim of Overend, Gurney & Co. quite as much as the extent of the liability of the contributories in class B; and yet if any of the contributories in class A had become bankrupt at any time after the commencement of the winding up, it seems clear on the authorities that the liquidator would have had to prove the amount of his liability on his estate, however difficult or even impossible it might have been to ascertain the amount of this liability at the time."

The only distinction between that case and the present is that there a situation like that of Mr. Sumner is designated by the word *contributory*, and that the English statute goes farther perhaps than that of 1867 in rendering the liabili-

ties of such a person provable even where that situation has originated after the adjudication in bankruptcy.

Again, in Financial Company *vs.* Lawrence, L. R., 4 C. P., 721, the distinction betwixt the relation of a stockholder before and after the beginning of proceedings for winding up is stated as being upon principle independent of the statutes which expressly render liability to calls provable in bankruptcy against all stockholders who are contributories at the time of going into bankruptcy. "Until the winding up of the company the liability of the stockholder is not calculable. It not only depends upon a great variety of circumstances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may be even a source of gain."

In conclusion, if the distinction which is relied upon in the above argument, viz., betwixt subscriptions to the stock of companies which at the time of the adjudication in bankruptcy are working, and subscriptions to stock of companies which at that period are not working, has been maintained, it will not be necessary to consider in detail most of the cases referred to by the learned counsel for the plaintiff in error after the 22d page of their brief, inasmuch as these apply only to companies of the former description or to persons in a state of things which involves the same principle, such as claims to dower where the husband is still living, &c.

S. F. PHILLIPS,
For Sumner.

PHILLIPS, LAMAR & ZACHRY.